No. 2145

United States
Circuit Court of Appeals
For the Ninth Circuit.

H. V. MOREHOUSE and I. S. THOMPSON,
Plaintiffs in Error,

vs.

GIANT POWDER COMPANY, Consolidated, a Corporation, PACIFIC HARDWARE AND STEEL COMPANY, a Corporation, and J. A. FOLGER & COMPANY, a Corporation,
Defendants in Error.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, Bankrupt.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Nevada.

FIILMER BROS. CO. PRINT, 330 JACKSON ST. S. F., CAL.

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INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of Attorneys of Record.]

I. S. THOMPSON and H. V. MOREHOUSE,
Attorneys for Plaintiffs in Error.

J. L. KENNEDY, E. E. ROBERTS, DETCH & CARNEY,
Attorneys for Petitioning Creditors.

[Petition in Bankruptcy.]

In the District Court of the United States in and for the District of Nevada.

IN BANKRUPTCY.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, an Alleged Bankrupt.

To the Honorable the District Court of the United States in and for the District of Nevada:

The petition of The Giant Powder Company, Consolidated, a corporation, organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City and County of San Francisco, State of California; and Pacific Hardware and Steel Company, a corporation, organized and existing under and by virtue of the laws of the State of New Jersey, and having its principal place of business in the City and County of San Francisco, State of California; and J. A. Folger and Company, a corporation, organized and existing under and by virtue of the laws of the State of California, and having its principal

place of business in the City and County of San Francisco, State of California, respectfully shows: That at all the times hereinafter mentioned the respondent above named, Exploration Mercantile Company, a corporation, has been and now is a corporation duly organized and existing under and by virtue of the laws of the State of Nevada, with its principal place of business at Goldfield, County of Esmeralda, State of Nevada.

That said respondent, Exploration Mercantile Company, has for the greater portion of six months next preceding the date of the filing of this petition had its principal place of business at Goldfield, County of Esmeralda, State of Nevada, and that at all said times it has been and now is engaged principally in trading and mercantile pursuits. That said Exploration Mercantile Company, a corporation, owes debts to the amount of One Thousand Dollars. That your petitioners are creditors of said Exploration Mercantile Company, a corporation, having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of Five Hundred Dollars. That the nature and amount of your petitioners' claims are as follows: [1*]

An open account for goods sold and delivered by said The Giant Powder Company, Consolidated, a corporation, to said Exploration Mercantile Company, a corporation, within two years last past, in the sum of $360.45; and a promissory note given by said Exploration Mercantile Company, a corpora-

*Page-number appearing at foot of page of original certified Record.

tion, to said The Giant Powder Company, Consolidated, a corporation, dated March 12, 1908, payable one day after date with interest at eight per cent per annum, in the sum of $15,888.72, which said note was given in consideration of goods sold and delivered prior to said 12th day of March, 1908.

An open account for goods sold and delivered by said Pacific Hardware and Steel Company, a corporation, to said Exploration Mercantile Company, a corporation, within two years last past, in the sum of $376.43; and a promissory note given by said Exploration Mercantile Company, a corporation, to said Pacific Hardware and Steel Company, a corporation, dated March 2, 1908, payable one day after date with interest at eight per cent per annum, in the sum of $15,035.56, which said note was given in consideration of goods sold and delivered prior to said 2d day of March, 1908.

An open account for goods sold and delivered by said J. A. Folger and Company, a corporation, to said Exploration Mercantile Company, a corporation, within two years last past, in the sum of $360.63; and a promissory note given by said Exploration Mercantile Company, a corporation, to said J. A. Folger and Company, a corporation, dated March 16, 1908, payable on demand with interest at eight per cent per annum, in the sum of $2,033.16, which said note was given in consideration of goods sold and delivered prior to said 16th day of March, 1908.

And your petitioners further represent that said Exploration Mercantile Company, a corporation, is

insolvent, and that within four months next preceding the date of this petition the said Exploration Mercantile Company, a corporation, committed an act of bankruptcy, in that it did heretofore, to wit, on the sixth day of August, A. D. 1908, being insolvent, apply for a receiver for its property; that is to say,

On the said sixth day of August, A. D. 1908, W. C. Stone, the president of said Exploration Mercantile Company, a corporation, filed his petition in the District Court of the First Judicial District of the State of Nevada, [2] in and for the County of Esmeralda, entitled "W. C. Stone, Plaintiff, vs. Exploration Mercantile Company, Defendant," and being number 2792 of the files of said court, wherein he alleged that the assets of said corporation were in danger of waste through attachment and litigation, and prayed that a receiver be appointed for its property and that the corporation be dissolved; and on the same day C. E. Wylie the manager and a director of said Exploration Mercantile Company, a corporation, filed in said last above mentioned cause his application on behalf of said Exploration Mercantile Company, a corporation, as follows, to wit:

"In the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda.

W. C. STONE,

Plaintiff,

vs.

EXPLORATION MERCANTILE COMPANY (a Corporation),

Defendant.

Now comes C. E. Wylie, Manager and one of the Directors of the above-named defendant, and enters the appearance of the said defendant in the above-entitled cause, and asks the above-entitled court to appoint as receiver of said defendant, C. E. Wylie, the undersigned, one of the directors of said corporation. C. E. Wylie, Manager and Director of the Exploration Mercantile Company."

And that on said 6th day of August, A. D. 1908, the said C. E. Wylie did in writing, file in said cause, admit and accept service of the summons issued in said cause, for said corporation. And your petitioners further represent that said District Court of the First Judicial District of the State of Nevada did on said sixth day of August, 1908, make its order appointing said C. E. Wylie receiver of the property of said Exploration Mercantile Company, a corporation, that on or about the 7th day of August, 1908, said C. E. Wylie qualified as such receiver and thence hitherto has continued to act and has been in possession of said property. Wherefore your peti-

tioners pray that service of this petition, with a subpoena, may be made upon Exploration Mercantile Company, a corporation, as provided in the acts of Congress relating to bankruptcy, and that it may be adjudged bankrupt within the purview of said acts.

THE GIANT POWDER COMPANY, CONSOLIDATED.

By C. C. QUINN,
Secretary of said Corporation.

E. E. ROBERTS,
J. L. KENNEDY and
ROBERT RICHARDS,
Attorneys for Petitioners.

PACIFIC HARDWARE AND STEEL COMPANY.

By W. H. SCOTT,
Assistant Secretary of said Corporation.

J. A. FOLGER & COMPANY,
By R. R. VAIL,
Secretary of said Corporation. [3]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

C. C. Quinn, R. R. Vail and W. H. Scott, do hereby make solemn oath that said C. C. Quinn is Secretary of The Giant Powder Company, Consolidated, a corporation, one of the petitioners herein; that said W. H. Scott is assistant Secretary of Pacific Hardware and Steel Company, a corporation, one of the petitioners herein; that said R. R. Vail is Secretary of J. A. Folger and Company, a corporation, one of

the petitioners herein; and that the statements contained in the foregoing petition subscribed by them are true according to the best of their knowledge, information and belief.

C. C. QUINN,
W. H. SCOTT.
R. R. VAIL.

Before me, R. B. Treat, a Notary Public in and for the City and County of San Francisco, State of California, this 5th day of September, A. D. 1908.

[Seal] R. B. TREAT,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: No. 103. In the District Court of the United States for the District of Nevada. In the Matter of Exploration Mercantile Company, a Corporation, an Alleged Bankrupt. In Bankruptcy. Creditors' Petition. Filed September 12, 1908, at 10 o'clock and 10 minutes A. M. T. J. Edwards, Clerk. E. E. Roberts, J. L. Kennedy and Robert Richards, Attorneys for Petitioners, Carson, Nevada.

[Petition for Injunction.]

In the District Court of the United States in and for the District of Nevada.

IN BANKRUPTCY.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, an Alleged Bankrupt.

Respectfully represents The Giant Powder Company, Consolidated, a corporation, Pacific Hardware and Steel Company, a corporation, and J. A. Folger and Company, a corporation, that they are the petitioners which have filed their petition in the above-entitled matter praying that the said Exploration Mercantile Company, a corporation, be adjudicated a bankrupt. That said Exploration Mercantile Company, a corporation, has a stock of goods, wares and merchandise consisting of hardware, groceries and other merchandise in Goldfield, [4] District of Nevada, a stock of similar goods at the town of Jamestown in said District, and another stock of similar merchandise at the town of Hornsilver in said District. That W. C. Stone, the President of said Exploration Mercantile Company, has stated to petitioners that said corporation has been doing business at a considerable loss during the last four or five months next prior to the appointment of the receiver mentioned in the petition on file herein.

That on or about the first day of August, 1908, said corporation advertised a sale of said merchandise at reduced prices, and said receiver C. E. Wylie has informed your petitioners that said corporation for some days prior to the appointment of said receiver, and said receiver since that time has been selling parts of said merchandise at greatly reduced prices. That said receiver has been procuring new merchandise and conducting the business and selling large quantities of goods. That in the petition filed in the District Court of the First Judicial District

of the State of Nevada, mentioned in the petition on file herein, the said W. C. Stone prayed that the receiver take charge of the affairs of said corporation, and conduct and manage the same with a view to its dissolution, and in the order made pursuant to said petition the said District Court ordered that the said corporation be, as far as the proceedings therein are concerned, dissolved, and that C. E. Wylie be appointed receiver with full power to take charge of the assets, control and business of the Exploration Mercantile Company.

That said petitioners are fearful that said goods, wares and merchandise will be dissipated and that they will sustain irreparable injury unless an injunction or restraining order be entered herein enjoining or restraining the said Exploration Mercantile Company, a corporation, and said C. E. Wylie, receiver, as aforesaid, from selling or otherwise disposing of any of the property of said alleged bankrupt.

The premises considered, they pray for an order enjoining and restraining the said Exploration Mercantile Company, a corporation, and C. E. Wylie, receiver as aforesaid, from disposing of said property, goods, wares and merchandise, or any part thereof.

E. E. ROBERTS,
ROBERT RICHARDS,
J. L. KENNEDY,
Attys. for Petitioners. [5]

J. L. Kennedy says that he is one of the attorneys of record for the petitioners hereinbefore named, and that the statements contained in the foregoing

petition are true, as he believes; that the reason this verification is not made by the petitioners is that each of the petitioners is a corporation duly organized and existing and having its principal place of business in the City and County of San Francisco, State of California, more than one hundred miles from the City of Carson, and that the deponent has been duly authorized to make this verification.

J. L. KENNEDY.

Subscribed and sworn to before me by J. L. Kennedy this 12th day of September, A. D. 1908.

[Seal] J. POUJADE,

Notary Public within and for the County of Ormsby, State of Nevada.

[Endorsed]: No. 103. In the District Court of the United States in and for the District of Nevada. In the Matter of Exploration Mercantile Company, a Corporation, an Alleged Bankrupt. Petition for Injunction. Filed September 12, 1908, at 10 o'clock and 10 Minutes A. M. T. J. Edwards, Clerk. E. E. Roberts, J. L. Kennedy and Robert Richards, Attorneys for Petitioners, Carson.

[Petition to Stay Proceedings.]

In the District Court of the United States in and for the District of Nevada.

IN BANKRUPTCY.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, an Alleged Bankrupt.

Your petitioners, The Giant Powder Company, Consolidated, The Pacific Hardware and Steel Company and J. A. Folger and Company, respectfully show: That on the —— day of September, 1908, your petitioners filed in said court their petition praying that said Exploration Mercantile Company be adjudged a bankrupt. That at the time of the filing of said petition a suit was pending in the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda, entitled "W. C. Stone, Plaintiff, vs. Exploration Mercantile Company, Defendant," and being number 2792 of the files of said court; and that in said suit such proceedings were had that one C. E. Wylie, a director of said alleged bankrupt, Exploration Mercantile Company, was appointed the receiver with full power [6] to take charge of the assets, control and business of said Exploration Mercantile Company.

That prior to the filing of said petition said C. E. Wylie qualified and thence hitherto continued to be and now is the qualified and acting receiver of the assets, control and business of said alleged bankrupt, and said C. E. Wylie at all said time has been and now is continuing and conducting the business of said alleged bankrupt.

That if said suit is not stayed, great injury will be done to your petitioners and the estate of the Exploration Mercantile Company, a corporation, to be administered in bankruptcy herein.

Wherefore, your petitioners pray that further proceedings in said suit may be stayed pursuant to the

bankruptcy laws of the United States in such cases made and provided, and that an injunction may be issued out of this Honorable Court directed to the said W. C. Stone, C. E. Wylie and Exploration Mercantile Company, restraining them, their agents, servants, attorneys and counselors, from further prosecuting said suit in said court, and for such other and further relief as to the Court may seem just.

E. E. ROBERTS,
J. L. KENNEDY,
ROBERT RICHARDS,
Attys. for Petitioners.

State of Nevada,
County of Ormsby,—ss.

I, J. L. Kennedy, one of the attorneys for the petitioners mentioned in the foregoing petition, do hereby make solemn oath that the statements of fact contained therein are true to the best of my knowledge, information and belief; that the reason this verification is not made by the petitioners is that each of the petitioners is a corporation duly organized and existing and having its principal place of business in the City and County of San Francisco, State of California, more than one hundred miles from the City of Carson, and that the deponent has been duly authorized to make this verification.

J. L. KENNEDY.

Subscribed and sworn to before me this 12th day of September, A. D. 1908.

[Seal] J. POUJADE,
Notary Public Within and for the County of Ormsby,
State of Nevada. [7]

[Endorsed]: No. 103. In the District Court of the United States in and for the District of Nevada. In the Matter of Exploration Mercantile Company, a Corporation, an Alleged Bankrupt. In Bankruptcy. Petition for Injunction to Stay Suit. Filed September 12, 1908, at 10 o'clock and 10 Minutes A. M. T. J. Edwards, Clerk. E. E. Roberts and J. L. Kennedy, Robert Richards, Attorneys for Petitioners, Carson, Nevada.

[Motion for Rule to Show Cause, and Affidavit of P. F. Carney.]

In the District Court of the United States, in and for the District of Nevada.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, an Alleged Bankrupt.

Now come the undersigned creditors herein and move the Court that a rule issue herein, directing W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse to appear in this court at Carson City, County of Ormsby, State of Nevada, on the 21st day of July, 1909, at 10 o'clock A. M., and show cause why an attachment for contempt should not issue against them for disobedience of the orders of this Court issued herein, copies of which orders and the return of service thereof by the United States Marshal are set forth in the hereinafter mentioned affidavit. Said motion being sup-

ported by the affidavit of P. F. Carney, and made a part hereof.

THE GIANT POWDER COMPANY, CONSOLIDATED.
PACIFIC HARDWARE AND STEEL COMPANY.
J. A. FOLGER & COMPANY.
By DETCH & CARNEY,
ROBERTS, RICHARDS & FOWLER,
J. L. KENNEDY,
Their Attorneys.

In the District Court of the United States, in and for the District of Nevada.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, an Alleged Bankrupt.

United States of America,
State of Nevada,
County of Ormsby,—ss.

P. F. Carney, being duly sworn on oath, [8] deposes and says: That he is a regular practicing attorney residing at Goldfield, Esmeralda County, Nevada, and that he is one of the attorneys of record for the petitioning creditors in the above-entitled cause.

That on the 12th day of September, 1908, the said petitioning creditors filed their petitions in the above-entitled court praying that the Exploration Mercantile Company, a corporation, be adjudged bankrupt within the purview of the acts of Congress relating to bankruptcy; that said Exploration Mercantile

Company and C. E. Wylie, its receiver, be enjoined and restrained from disposing of its property, goods, wares and merchandise, or any part thereof; and that further proceedings in the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda, in the cause entitled "W. C. Stone, Plaintiff, vs. Exploration Mercantile Company, Defendant," be stayed pursuant to the bankruptcy laws of the United States in such cases made and provided, and that an injunction be issued out of this Honorable Court directed to the said W. C. Stone, C. E. Wylie, and Exploration Mercantile Company, restraining them, their agents, servants, attorneys and counselors, from further prosecuting said suit in said State Court.

That thereupon and on said 12th day of September, 1908, this Honorable Court made its two certain orders, copies of which are as follows, to wit:

"*In the District Court of the United States, in and for the District of Nevada.*

IN BANKRUPTCY.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, an Alleged Bankrupt.

United States of America,
District of Nevada,—ss.

The President of the United States of America, to W. C. Stone, C. E. Wylie, and Exploration Mercantile Company, a Corporation, Greeting:

Where as a petition has been filed on the bankruptcy side of the District Court of the United States

for the District of Nevada, praying for an injunction to restrain the prosecution of a certain suit pending in the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda, in which said W. C. Stone, is plaintiff, and Exploration Mercantile Company is defendant, and has obtained an allowance for an injunction, as prayed for in said petition from the District Court of the United States, for the District of Nevada:

Now, therefore, we, having regard to the matters in said petition contained, do hereby command and strictly enjoin you, the said W. C. Stone, C. E. Wylie, and Exploration Mercantile Company, a corporation, or either of you, and each of your agents, servants, attorneys or counsellors, from further prosecuting said suit in said Court, and from taking any further step or proceeding in said action or suit now pending, as aforesaid, which commands and injunction you are respectively required to observe until our [9] said District Court shall make further order in the premises. Hereof fail not, under the penalty of the law thence ensuing.

Witness, the Honorable E. S. FARRINGTON, District Judge of the United States for the District of Nevada, this 12th day of September, A. D. 1908, and in the hundred and thirty-third of the Independence of the United States of America.

[Seal] T. J. EDWARDS,
Clerk of said Court.

In the District Court of the United States, in and for the District of Nevada.

IN BANKRUPTCY.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, an Alleged Bankrupt.

Respectfully represents The Giant Powder Company, Consolidated, a corporation, Pacific Hardware and Steel Company, a corporation, and J. A. Folger and Company, a corporation, that they are the petitioners which have filed their petition in the above-entitled matter praying that the said Exploration Mercantile Company, a corporation, be adjudicated a bankrupt. That said Exploration Mercantile Company, a corporation, has a stock of goods, wares, and merchandise consisting of hardware, groceries and other merchandise in Goldfield, District of Nevada, a stock of similar goods at the town of Jamestown, in said District, and another stock of similar merchandise at the town of Hornsilver, in said District.

That W. C. Stone, the president of said Exploration Mercantile Company, has stated to petitioners that said corporation has been doing business at a considerable loss during the last four or five months next prior to the appointment of the receiver mentioned in the petition on file herein.

That on or about the first day of August, 1908, said corporation advertised a sale of said merchandise at reduced prices and said receiver, C. E. Wylie, has informed your petitioners that said corporation for

some days prior to the appointment of said receiver, and said receiver since that time, has been selling parts of said merchandise at greatly reduced prices.

That said receiver has been procuring new merchandise and conducting the business and selling large quantities of goods.

That in the petition filed in the District Court of the First Judicial District of the State of Nevada, mentioned in the petition on file herein, the said W. C. Stone prayed that receiver take charge of the affairs of said corporation, and conduct and manage the same with a view to its dissolution, and in the order made pursuant to said petition the said District Court ordered that the said corporation be, as far as the proceedings therein are concerned, dissolved, and that C. E. Wylie be appointed receiver with full power to take charge of the assets, control and business of the Exploration Mercantile Company.

That said petitioners are fearful that said goods, wares and mechandise will be dissipated and that they will sustain irreparable injury unless an injunction or restraining order be entered herein enjoining or restraining the said Exploration Mercantile Company, a corporation, and said C. E. Wylie, receiver, as aforesaid, from selling or otherwise disposing of any of the property of said alleged bankrupt.

The premises considered, they pray for an order enjoining and restraining the said Exploration Mercantile Company, a corporation, and C. E. Wylie, receiver as aforesaid, from disposing of said prop-

erty, goods, wares and merchandise, or any part thereof.

E. E. ROBERTS,
ROBERT RICHARDS,
J. L. KENNEDY,
Attys. for Petitioners.

J. L. Kennedy says that he is one of the attorneys of record for the petitioners hereinbefore named, and that the statements contained in the foregoing petition are true, as he believes; that the reason this verification is not made by the petitioners is that each of the petitioners is a corporation duly organized and existing and having its principal place of business in the City and County of San Francisco, State of California, [10] more than one hundred miles from the City of Carson, and that the deponent has been duly authorized to make this verification.

J. L. KENNEDY.

Subscribed and sworn to before me by J. L. Kennedy, this —— day of September, A. D. 1908.

[Seal] J. POUJADE,
Notary Public Within and for the County of Ormsby, State of Nevada."

In the District Court of the United States, in and for the District of Nevada.

IN BANKRUPTCY.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, an Alleged Bankrupt.

And now, this 12th day of September, 1908, on motion of said attorneys, it appearing to the Court that there is danger of irreparable injury to the creditors of the said debtor, unless the act sought to be enjoined is at once restrained, it is ordered that the above motion be heard at a session of said court, to be held at the City of Carson, on the 18th day of September, A. D. 1908, at 10 o'clock A. M.; and it is further ordered that, until the decision of this court upon the said motion, the said parties against whom an injunction is prayed be restrained, and they are hereby commanded, under such penalties as are inflicted by the laws of the United States, to abstain from the sale of, or in any other manner whatever disposing of, the property or estate or any part thereof of the above named Exploration Mercantile Company, a corporation.

E. S. FARRINGTON,
Judge.

That thereafter said orders were placed in the hands of the United States Marshal for the District of Nevada for service and were duly and regularly served by him at the times and in the manner set forth in said Marshal's return annexed to the writ of subpoena on file herein, a copy of which said return is as follows, to wit:

"United States of America,
District of Nevada,—ss.

I hereby certify and return that I received the within writ together with a certified copy of the Creditor's complaint, and that I served the same on W. C. Stone, personally, as the President of the Explora-

tion Mercantile Company, at Goldfield, in said District, on the 14th day of Sepember, 1908. I further certify and return that I served W. C. Stone, personally, as the President of the Exploration Mercantile Company, with an Order to Show Cause, a Temporary Restraining Order, and an Injunction to Stay Suit, at Goldfield, in said District, on the 14th day of September, 1908. I also certify and return that I served C. E. Wylie, personally, as the Receiver in charge of the Exploration Mercantile Company, with an Injunction to Stay Suit and a Temporary Restraining Order, at Goldfield, in said district, on the 14th day of September, 1908.

ROBERT GRIMMON,
U. S. Marshal.
By H. R. Mack,
Deputy.

MARSHAL'S EXPENSES AND FEES.

7 services	$ 28.00
Mileage on two writs, 345 miles each at 12¢	82.80
	$110.80."

[11]

That on said 14th day of September, 1908, service of said orders was admitted in writing, a copy of which writing is as follows, to wit:

"Service of the within subpoena, petition in bankruptcy, order to show cause, temporary restraining

order, and the injunction to stay suit, this 14th day of September, 1908.

EXPLORATION MERCANTILE CO.
By W. C. STONE.
C. E. WYLIE,
Receiver."

That said two orders have been at all times since their issuance and now are in full force and effect, and have not been modified. That at all times herein mentioned C. E. Wylie has been the vice-president of said Exploration Mercantile Company and the Receiver thereof appointed by said State Court; that said C. E. Wylie has wilfully and contemptuously violated said orders, in this, that he did as such Receiver, after the service of said orders upon him collect moneys due said Exploration Mercantile Company at divers times between the 30th day of September, 1908, and the 27th day of April, 1909, in sums aggregating in excess of $3,000.00.

That said C. E. Wylie has further wilfully and contemptuously violated said orders in this, that he did as such Receiver, after the service of said orders upon him, wilfully and contemptuously pay out at divers times between the 30th day of September, 1908, and the 30th day of April, 1909, sums of money, the property of said Exploration Mercantile Company, aggregating more than $10,000.00.

That said C. E. Wylie has further wilfully and contemptuously violated said orders in this, that he has appropriated, after the service of said orders upon him, to his own use, out of the moneys of said Exploration Mercantile Company, sums aggregating

more than $1,000.00.

That said C. E. Wylie has further wilfully and contemptuously violated said orders in this, that he did, after the service of said orders upon him, wilfully and contemptuously ask the said State Court on the 10th day of February, 1909, for an order permitting him as such Receiver, to sell the property of said Exploration Mercantile Company.

That Walter C. Stone has at all times herein mentioned been the President of said Exploration Mercantile Company; that said Walter C. Stone has wilfully and contemptuously violated said orders, in this, that he has, after service of said orders upon him, wilfully and contemptuously demanded and [12] received from said C. E. Wylie the following sums of money, the property of said Exploration Mercantile Company, to wit:

On October 7, 1908, the sum of...$	500.00
On November 6, 1908, the sum of..	500.00
On December 7, 1908, the sum of..	1500.00
On January 19, 1908, the sum of..	500.00
Total.....$	3000.00

That Frank G. Hobbs has at all times mentioned been the Secretary of said Exploration Mercantile Company; that said Frank G. Hobbs has wilfully and contemptuously violated said orders in this, that he has after having actual notice and knowledge of said orders and the contents thereof assisted said C. E. Wylie in the collection of the aforesaid sums of money herein alleged to have been collected by said C. E. Wylie, and has been employed by said C. E.

Wylie, as Receiver, and has received from said Receiver at divers times, after having had notice and knowledge of said orders, and between the 1st day of October, 1908, and the 30th day of April, 1909, sums aggregating more than $700.00.

That I. S. Thompson has at all times herein mentioned been an attorney at law and a member of the law firm of Thompson, Morehouse & Thompson, and that said law firm has been at all said times the attorneys for said C. E. Wylie, Receiver, and for Walter C. Stone. That said I. S. Thompson, after having notice and knowledge of said orders and of their contents, has wilfully and contemptuously violater said orders in this, that he has counselled and advised said Walter C. Stone to demand and receive from said C. E. Wylie the sums of money hereinbefore alleged to have been paid by said C. E. Wylie to said Walter C. Stone, and counselled and advised said C. E. Wylie to pay said sums to said Walter C. Stone; and that said I. S. Thompson did further wilfully and contemptuously demand and receive from said C. E. Wylie on the 7th day of December, 1908, the sum of $1,000.00, as an attorneys' fee.

That H. V. Morehouse has at all times herein mentioned been an attorney at law and a member of the law firm of Thompson, Morehouse & Thompson, and that said law firm has been at all said times the attorneys for said C. E. Wylie, Receiver, and for Walter C. Stone; that after having knowledge and notice of said orders and their contents said H. V. Morehouse has wilfully and contemptuously violated said orders in this, that he has counselled and [13]

advised said C. E. Wylie to collect said sums of money collected by him as aforesaid; he has asked the said State Court on behalf of said C. E. Wylie, to make the aforesaid order of sale of the property of said Exploration Mercantile Company, and, in conjunction with I. S. Thompson, another member of said law firm, has demanded and received from said C. E. Wylie, on the 7th day of December, 1908, the sum of $1,000.00 as an attorneys' fee; that said H. V. Morehouse, after having said notice and knowledge of said orders and their contents, advised the Honorable Peter J. Somers, Judge of the District Court of the Seventh Judicial District of the State of Nevada, in and for Esmeralda County, in a proceeding before said court in the case of W. C. Stone vs. Exploration Mercantile Company, to pay no attention to the action of the Federal Court. And further affiant saith not.

P. F. CARNEY.

Subscribed and sworn to before me this 9th day of July, A. D. 1909.

T. J. EDWARDS,
Clerk of the United States District Court, in and for the District of Nevada.

[Indorsed]: No. 103. In the District Court of the United States for the District of Nevada. In the Matter of Exploration Mercantile Co., a Corporation, an Alleged Bankrupt. Motion and Affidavit. Filed July 9th, 1909, at 2:30 o'clock P. M. T. J. Edwards, Clerk.

[Affidavit on Dissolution of Injunction and Stay of Proceedings.]

In the District Court of the United States for the District of Nevada.

No. 103.

In the Matter of EXPLORATION MERCANTILE COMPANY (a Corporation), an Alleged Bankrupt.

Comes now the Exploration Mercantile Company, and, appearing to the order to show cause or temporary restraining order issued herein, says that said Exploration Mercantile Company is not insolvent, but that its assets at a fair valuation is fully $95,000.00, while its liabilities are $74,664.36; that it is true that for several months there has been a general depression in business at Goldfield, County of Esmeralda, State of Nevada, but that it is now true that said Exploration Mercantile Company has been [14] doing business at a loss, and that what said W. C. Stone, President of said Company meant in saying that said company had been doing business at a considerable loss was, that the business of said company, compared with its business on former times, was less, and not that the said company was losing money or selling goods, wares and merchandise at a loss. It is true also that on or about the 1st day of August, 1908, it advertised a sale of goods, wares and merchandise at reduced selling prices, but that in making such sales, said Exploration Mercantile Company was only meeting the present business conditions surrounding all business

in Goldfield, at that time, and that such advertised sale was not made with the intent or purpose of selling goods, wares and merchandise at a loss to said Exploration Mercantile Company, but simply to induce and procure quick sale, and rapid transactions, and make for the time smaller profits; but by having larger sales, to reap advantage, and such action was simply a good and prudent act, and in no way injurious to any creditor of said Exploration Mercantile Company, but an act leading to the advantage of the business of said Exploration Mercantile Company, which, upon the slightest examination, any business man acquainted with the conditions surrounding business in Goldfield, would approve; that reduced prices and quick sales is a matter of business judgment and dependent upon a knowledge of business conditions in Goldfield, and that in no instance have sales been made unprofitable to said Exploration Mercantile Company, or to the injury of its creditors; that it is true that under a complaint filed by W. C. Stone, a stockholder in said Exploration Mercantile Company, under and by virtue of the provisions of an act of the legislature of the State of Nevada, entitled "An Act providing a general corporation law," approved March 16th, 1903, the District Court of the First Judicial District, of the State of Nevada, in and for the County of Esmeralda, made an order and appointed C. E. Wylie, Receiver of said Exploration Mercantile Company (a corporation), and that said C. E. Wylie has duly qualified as such receiver, and he has been ever since the 6th day of August, 1908, and is now the duly appointed, qualified and acting

receiver of said State Court, and has now and ever since the said 6th day of August, 1908, has had in his possession and under his control, the assets of said [15] Exploration Mercantile Company, and manages the business thereof, under the direction and orders of said State Court and not otherwise; that it is to the best interests of said Exploration Mercantile Company that its business be kept as a going concern, and to that end the said receiver must purchase new goods and keep the said business well stocked; and also under said act of said legislature, aforesaid, and the proceedings pending in said State Court, it is the duty of said receiver to keep the said business going until a period of four months, have run, or such time as said State Court may direct, to enable creditors to present their claims in said State Court, so that they may be paid by said receiver; that said receiver represents the creditors and stockholders of said Exploration Mercantile Company, and will, in due time, under the orders of said State Court, pay the said creditors their just debts; that the proceeding was taken in said State Court for the very purpose of saving the assets of said Exploration Mercantile Company, from loss or waste and to that end, the assets of said Company are now under the control and jurisdiction of a court of competent jurisdiction, both of the subject matter and of said Exploration Mercantile Company, prior to any proceedings in this Hon. Court, and said State Court having such jurisdiction, affiant avers that this Hon. Court has no authority or jurisdiction in the premises to issue an injunction or an order staying proceedings

in the premises; that said Exploration Mercantile Company is a corporation which, under the State law aforesaid, can be put in the hands of receiver, without any intent or purpose of insolvency, but for the purpose of saving its assets, and preventing preferences to creditors, and such proceeding under said State law aforesaid is not an assignment, general or otherwise, within the meaning of the bankrupt act of the United States, but a means of avoiding insolvency or bankruptcy, so that when creditors are paid, there will be something left for stockholders; that the assets of said Exploration Mercantile Company are sufficient to pay all creditors, and there is no danger of irreparable loss or any loss to any of the creditors, and that the assets are under the control of the State Court, where no improper conduct on the part of the receiver or any mismanagement by him can take place, and each and every creditor can at any and all times invoke the aid of said State [16] Court and see that his rights are fully preserved and protected and said receiver for the faithful performance of his duty has given a good and sufficient bond in the sum of Fifty Thousand ($50,000) Dollars, which stands liable to the creditors that no waste or mismanagement shall take place, all of which these creditors fully know; that said bond can be increased at any time upon the application of the creditors in said State Court, and they and each of them can at any time proceed in said State Court in the proceeding there pending, and have any interest they may have fully protected so that there is no danger of loss or injury to said creditors; and affiant further avers

that he is informed and believes, as a matter of law, that this Hon. Court has no jurisdiction in the premises to enjoin said State Court or its receiver, and that the injunction has been improperly issued herein, and the restraining order improperly issued; that said receiver is a man of business ability and experience, and has been for a long time connected with the said Exploration Mercantile Company and perfectly familiar with its business and the conditions surrounding it, and was appointed by said State Court, because of his superior qualifications in that behalf; and affiant further states that he is the bookkeeper of said Exploration Mercantile Company, and also a director thereof, and has been the bookkeeper of said receiver and is familiar with the sales and transactions under said receiver, and that under the advertised sales of reduced prices of August 1st, 1908, as conducted by said receiver from August 7th, 1908, to Sept. 5th, 1908, on articles of goods, wares and merchandise other than paints, oils, hardware, crockery, etc., the net profit was (12%) twelve per cent, after deducting cost, of the merchandise, and expense of doing business and the paints, oils, hardware and crockery, etc., the net profits thereon after deducting the cost of the same and expenses of doing business, was (14%) fourteen per cent, so that no loss was in any manner sustained, and no danger of loss to creditors; that affiant is familiar with the assets of said Exploration Mercantile Company, and the market value thereof, in Goldfield.

FRANK G. HOBBS. [17]

Subscribed and sworn to before me this 15th day of September, A. D. 1908.

[Seal] I. S. THOMPSON,
Notary Public in and for the County of Esmeralda, State of Nevada.

[Indorsed]: No. 103. In the District Court of the United States in and for the District of Nevada. In the Matter of the Exploration Mercantile Company (a Corporation), an Alleged Bankrupt. Affidavit on Dissolution of Injunction and Stay of Proceedings. Filed September 18, 1908, at 10 o'clock A. M. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. Thompson, Morehouse & Thompson.

In the District Court of the United States, in and for the District of Nevada.

No. 103.

In the Matter of EXPLORATION MERCANTILE COMPANY (a Corporation), an Alleged Bankrupt.

Demurrer.

The demurrer of Exploration Mercantile Company alleged bankrupt herein, to the petition of the Pacific Hardware and Steel Company (a corporation); J. A. Folger, and Company (a corporation); and Giant Powder Company, Consolidated, praying that said Exploration Mercantile Company be adjudicated a bankrupt, now this defendant by protestation, not confessing or acknowledging all or any of the matters and things in said petitioner's petition to be true in

such manner and form as the same are therein set forth, and alleged, demurs to (a) As to so much of said petition as reads as follows, to wit:

"And your petitioners further represent that said Exploration Mercantile Company a corporation, is insolvent, and that within four months next preceding the date of this petition, the said Exploration Mercantile Company, a corporation, committed an act of bankruptcy, in that it did heretofore, to wit, on the sixth day of August, A. D. 1908, being insolvent, apply for a receiver for its property; that is to say,

On the said sixth day of August, A. D. 1908, W. C. Stone, the President of said Exploration Mercantile Company, a corporation, filed his petition in the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda, entitled 'W. C. Stone, Plaintiff, vs. Exploration Mercantile Company, Defendant,' and being number 2792 of the files of said court, wherein he alleged that the assets of said corporation were in danger of waste, through attachment and litigation, and prayed that a receiver be appointed for its property and that the corporation be dissolved; and on the same day C. E. Wylie, the manager and director of said Exploration Mercantile Company, a corporation, filed in said last above mentioned cause, his application on behalf of said Exploration Mercantile Company, a corporation, as follows, to wit:

In the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda.

W. C. STONE,

Plaintiff,

vs.

EXPLORATION MERCANTILE COMPANY (a Corporation),

Defendant. [18]

Now comes C. E. Wylie, manager, and one of the directors of the above-named defendant, and enters the appearance of the said defendant in the above-entitled cause, and asks the above-entitled court to appoint as receiver of said defendant, C. E. Wylie, the undersigned, one of the directors of said corporation.

C. E. WYLIE,

Manager and Director of the Exploration Mercantile Company.

And that on said 6th day of August, A. D. 1908, the said C. E. Wylie did, in writing, file in said cause, admit and accept service of the summons issued in said cause for said corporation.

And your petitioners further represent that said District Court of the First Judicial District of the State of Nevada did on said sixth day of August, 1908, make its order, appointing said C. E. Wylie receiver of the property of said Exploration Mercantile Company, a corporation; that on or about the 7th day of August, 1908, said C. E. Wylie, qualified as such

receiver and thence hitherto has continued to act and has been in possession of said property."

And for cause of demurrer thereto states the following grounds: (a) That said petitioners are not entitled to the relief prayed for in said petition. (b) That the said act and proceeding in the State Court as averred in said petition was and is not an act of bankruptcy. (c) That it nowhere appears upon the face of said petition that said Exploration Mercantile Company is insolvent. (d) That it nowhere appears upon the face of said petition that said Exploration Mercantile Company ever filed any proceeding in the State Court or consented there, or (1) signed any writing by anyone authorized so to do or (2) made a distinct admission of its inability to pay its debts, or (3) made an unqualified expression of its willingness to be adjudged a bankrupt.

That it appears upon the face of said petition that the whole matter of the petition is now in a State Court, having complete and perfect jurisdiction in the premises of the subject matter, and of the said Exploration Mercantile Company, and of the assets of said Exploration Mercantile Company in the hands of its receiver, long before the petition herein was filed, in this court, and that therefore this court has no jurisdiction in the premises.

Wherefore, and for divers and other good causes of demurrer appearing in said petition, the Exploration Mercantile Company demurs thereto, and humbly demands the judgment of this Court whether it shall be compelled to make any further or other answer to said petition, and prays to be hence dismissed with

its costs, and charges in this behalf most wrongfully sustained.

THOMPSON, MOREHOUSE & THOMPSON,
Attorneys for Exploration Mercantile Company.

[19]

State of Nevada,
County of Esmeralda,—ss.

Frank G. Hobbs, being duly sworn, says that he is the Secretary and Treasurer of said Exploration Mercantile Company, and makes this affidavit in its behalf, and says the foregoing demurrer is not interposed for delay and that the same is true in point of fact.

FRANK G. HOBBS.

Subscribed and sworn to before me this 15th day of Sept. A. D. 1908.

[Seal] I. S. THOMPSON,
Notary Public, in and for the County of Esmeralda, State of Nevada.

I hereby certify that in my opinion, the foregoing demurrer is well founded in point of law.

H. V. MOREHOUSE,
Of Counsel for Exploration Mercantile Co.

[Indorsed]: No. 103. In the District Court of the United States in and for the District of Nevada. In the Matter of the Exploration Mercantile Company (a Corporation), an Alleged Bankrupt. Demurrer. Filed September 17, 1908, at 9 o'clock A. M. T. J. Edwards, Clerk. Thompson, Morehouse & Thompson, Attorneys for Explo. Merc. Co.

In re EXPLORATION MERCANTILE CO., in Bankruptcy.

Order Sustaining Demurrer.

The demurrer to the creditors' petition, heretofore argued and submitted, having been duly considered by the Court, it is now ordered that the same be, and is hereby, sustained; and that the petitioning creditors have twenty days' time in which to amend their petition.

[Answer and Demand for Jury.]

In the District Court of the United States, in and for the District of Nevada.

In the Matter of the EXPLORATION MERCANTILE COMPANY (a Corporation), an Alleged Bankrupt.

Now comes the Exploration Mercantile Company, the corporation against whom a petition for adjudication in bankruptcy has been filed, [20] herein, and does hereby controvert the amended petition, and files the following answer: I. That said Exploration Mercantile Company did not commit an act of bankruptcy as alleged in the amended petition, but, on the contrary, charges the fact to be that all proceedings taken in said District Court of the State of Nevada was taken against it and was not the act of said Exploration Mercantile Company.

II. That at the time of the filing in said State District Court of the proceeding set out in said amended petition, said Exploration Mercantile Com-

pany was not insolvent, but, on the contrary, avers that its property at a fair valuation was more than sufficient to pay its debts.

III. That said Exploration Mercantile Company never at any time applied for a receiver, and denies that there was no threatened litigation or threatened attachments against it, but, on the contrary, avers that a suit was brought and an attachment issued against it on the said 6th day of August, 1908, and released only by virtue of the said proceedings in said State District Court.

IV. That it is not true that W. C. Stone, C. E. Wylie and Frank G. Hobbs conspired or agreed to such measures or acts to hinder, delay and defraud the creditors of said Exploration Mercantile Company, or to compel said or such creditors to accept less than the full payment of their just claims or to wrongfully or otherwise obtain for said directors or officers a large part of the property of said Exploration Mercantile Company (a corporation), or that they or either of them intended to or would evade the laws of the United States, in reference to bankruptcy, or prevent said creditors from obtaining knowledge of the true condition of the affairs of said corporation or participating therein, or to prevent said creditors of a choice of a person or persons, as trustee or trustees of said corporation, or its property, or that in pursuance of any conspiracy or agreement said directors or officers acting for or in behalf of or as the act or deed of said corporation or that said corporation was then or there insolvent, on the 6th day of August, 1908, or at any other time caused to be filed

in said State District Court, the application set forth in said amended petition, or that any of the acts set out in said amended petition was the act or deed of said corporation, while insolvent or with a view of insolvency, or was [21] through any conspiracy or agreement to injure, delay or defraud any creditor or creditors of said corporation.

V. That said W. C. Stone did on or about the 8th day of September, 1908, make by way of compromise, and not otherwise, a proposition to said petitioners to adjust their claims upon a basis approximately at sixty per centum, but such proposition of compromise was not made in pursuance of or in furtherance of any conspiracy, but solely for the reason that by the wrongful and unjust acts of these petitioners in filing the original petition, herein, and causing an injunction to issue out of this court, they closed up the business of said corporation, then a going concern, to its great damage and to the damage and injury of the creditors thereof, and stopped and prevented the said corporation from carrying on and conducting its business, and drove its customers to other people and destroyed its goodwill, which was then and there of great value, and by reason thereof the said W. C. Stone made the said proposition of compromise and not otherwise.

VI. It is true that said officers, but not in conspiracy or agreement, have refused to let one J. L. Kennedy have access to its books, upon personal demand made by him, and for the reason that the said corporation was in the hands of a receiver in the said proceedings, in said State Court, and therefore

its books and papers were in the custody of the law and not in the custody and control of the officers and directors of said corporation and it avers; that said creditors or either of them could at any time apply to said State Court and obtain any inspection of the books of said corporation they or any of them desired.

VII. It is not true that said Exploration Mercantile Company or any of its officers have acquiesced in said proceedings, in said State Court, further than they were bound so to do, by reason of the nature and character of said proceedings, and as they were bound to do, under the State law applying to said proceeding.

VIII. That the proceeding in said State Court was commenced prior to the filing of the petition herein and that said State Court had jurisdiction in the premises both of the subject matter and person of said Exploration Mercantile Company, and its receiver was duly and regularly appointed and duly and regularly qualified, and was in the sole and exclusive possession of all the property of this corporation when the petition was [22] filed herein, and that said court was and is a separate court, over which this Hon. Court has no supervisory control or jurisdiction and that the proceedings in said State Court was not an act of bankruptcy, and therefore this Hon. Court has no jurisdiction in the premises and therefore it avers it should not be declared bankrupt, for any cause in said amended petition alleged, and this it prays and demands and that the matter

may be inquired into by a jury.

EXPLORATION MERCANTILE COMPANY.

By FRANK G. HOBBS,
Secretary.

State of Nevada,
County of Esmeralda,—ss.

Frank G. Hobbs, being duly sworn, says, that he is the Secretary of the Exploration Mercantile Company, alleged bankrupt herein, and does hereby make solemn oath that the statements of fact contained in the foregoing answer are true, according to the best of his knowledge, information and belief.

FRANK G. HOBBS.

Subscribed and sworn to before me this 28th day of October, A. D. 1908.

[Seal] H. M. FARNAM,
Notary Public in and for the County of Esmeralda, State of Nevada.

THOMPSON, MOREHOUSE & THOMPSON,
Attorneys for Alleged Bankrupt, Exploration Mercantile Company.

[Indorsed]: No. 103. In the District Court of the United States, in and for the District of Nevada. In the Matter of the Exploration Mercantile Company (a Corporation), an Alleged Bankrupt. Answer and Demand for Jury. Filed Oct. 30, 1908, at 9 o'clock A. M. T. J. Edwards, Clerk. Thompson, Morehouse & Thompson, Attorneys for Alleged Bankrupt, Goldfield, Nevada.

[Verdict.]

In the District Court of the United States, in and for the District of Nevada.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, an Alleged Bankrupt.

Interrogatory No. 1. Whether on the 6th day of August, 1908, the date of the appointment of C. E. Wylie, as Receiver of the Exploration Mercantile Company by the District Court of the First Judicial District of the State of Nevada in the case of W. C. Stone vs. Exploration Mercantile Company, the aggregate of the property of the said Exploration Mercantile Company was, at a fair valuation, sufficient in amount to pay its debts.

Answer. No. [23]

Interrogatory No. 2. Whether on the 12th day of September, 1908, the date of the filing of the petition in bankruptcy in these proceedings, the aggregate of the property of said Exploration Mercantile Company was, at a fair valuation, sufficient in amount to pay its debts.

Answer. No.

Interrogatory No. 3. Whether on the 6th day of August, A. D. 1908, the Exploration Mercantile Company, being insolvent, applied for a Receiver for its property.

Answer. Yes.

Dated, this 8th day of July, 1909.

Attest: S. J. HODGKINSON,
Foreman.

[Indorsed]: No. 103. U. S. Dist. Court, Dist. of Nevada. In re Exploration Mercantile Company. In Bankruptcy. Verdict. Filed July 8, 1909, at 4:15 o'clock P. M. T. J. Edwards, Clerk.

[Adjudication in Bankruptcy.]

In the District Court of the United States for the District of Nevada.

IN BANKRUPTCY.

In the Matter of EXPLORATION MERCANTILE COMPANY (a Corporation),

Bankrupt.

At Carson City, in said district, on the 9th day of July, A. D. 1909, before the Honorable E. S. Farrington, Judge of said court in bankruptcy, the petition of The Giant Powder Company, Consolidated, a corporation, Pacific Hardware and Steel Company, a corporation, and J. A. Folger and Company, a corporation, that Exploration Mercantile Company, a corporation, be adjudged a bankrupt, within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said Exploration Mercantile Company, a corporation, is hereby declared and adjudged bankrupt accordingly.

Witness the Honorable E. S. FARRINGTON, Judge of said court, and the seal thereof, at Carson

City, in said district, on the 9th day of July, A. D. 1909.

[Seal] T. J. EDWARDS,
Clerk.
By H. D. Edwards,
Deputy.

[Indorsed]: No. 103. U. S. District Court, District of Nevada. In the Matter of Exploration Mercantile Company, a Corporation, Bankrupt. Adjudication. Filed July 9th, 1909, at 3 o'clock P. M. T. J. Edwards, Clerk. By H. D. Edwards, Deputy Clerk. [24]

[Order to Show Cause.]

In the District Court of the United States, in and for the District of Nevada.

No. 103—IN BANKRUPTCY.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, an Alleged Bankrupt.

On motion of petitioning creditors herein, supported by the affidavit of P. F. Carney, and good cause appearing therefor, it is hereby ordered and directed that you, W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, be and appear before this Court at Carson City, Ormsby County, State of Nevada, on the 21st day of July, A. D. 1909, at 10 o'clock A. M., to show cause, if any you have, why you and each of you should not be adjudged guilty of contempt of this Court for disobedience of

the lawful orders of this Court, as appears from the affidavit of P. F. Carney; and

It is further ordered that a copy of this order, together with a copy of the motion and said affidavit of P. F. Carney, be served upon the said W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse.

Dated this 9th day of July, A. D. 1909.

E. S. FARRINGTON,
Judge.

[Indorsed]: No. 103. In the District Court of the United States, in and for the District of Nevada. In the Matter of Exploration Mercantile Co., a Corporation, an Alleged Bankrupt. Order. Filed July 9th, 1909. T. J. Edwards, Clerk. By H. D. Edwards, Deputy.

RETURN.

United States of America,
District of Nevada,—ss.

I hereby certify that I received the within Order on the 9th day of July, 1909, and served the same (together with a copy of the Motion and the affidavit of P. F. Carney) on the within named W. C. Stone, C. E. Wylie, Frank G. Hobbs and H. V. Morehouse, at Carson City, in said district, on the 9th day of July, 1909.

Dated, July 10th, 1909.

H. J. HUMPHREYS,
U. S. Marshal.
By R. D. Goode,
Deputy.

Marshal's fees—4 services, $16.00.

[Affidavit of I. S. Thompson Answering Affidavit of P. F. Carney.]

In the District Court of the United States, in and for the District of Nevada.

In the Matter of the EXPLORATION MERCANTILE COMPANY (a Corporation), Bankrupt, and the Application of P. F. Carney, Esq., in Said Proceeding by Affidavit, and the Order of Hon. E. S. Farrington, Judge of Said Court, of Date July 9th, 1909, issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc.

[25]

Comes now I. S. Thompson, in his own behalf, and answering said affidavit of said P. F. Carney, and begs leave to reply thereto to show the following causes, why he should not be adjudged guilty of contempt, and first as to the facts, and second as to the law.

United States of America,
State of Nevada,—ss.

I, S. Thompson, being first duly sworn, says, that he is a regular practicing attorney, duly admitted to practice law in the Supreme Court of the State of Nevada, and in the United States District Court in and for the State of Nevada, and the United States Circuit Court for the Ninth Circuit and the United States Circuit Court of Appeals for the Ninth Circuit; that he resides at the town of Goldfield, in the County of Esmeralda, State of Nevada, and is a mem-

ber of the law firm of Thompson, Morehouse & Thompson, of Goldfield, consisting of I. S. Thompson, H. V. Morehouse and J. G. Thompson, and has been such member of said firm since the 15th day of August, 1906; that on the 6th day of August, 1908, W. C. Stone filed in the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda, his complaint in writing, in the words and figures following, to wit:

"In the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda.

W. C. STONE,

Plaintiff,

vs.

EXPLORATION MERCANTILE COMPANY,

Defendant.

The plaintiff complaining of the defendant alleges:

1. That the defendant is a corporation organized and existing under and by virtue of the laws of the State of Nevada, with its principal place of business at Goldfield, in the County of Esmeralda, State of Nevada; that the defendant, as such corporation, has a capital stock of fifty thousand dollars ($50,000) divided into fifty thousand (50,000) shares of the par value of one ($1.00) dollar per share; that the officers of said corporation are the plaintiff, President; C. E. Wylie, Vice-president, and Frank G. Hobbs, Secretary and Treasurer; the directors of said company are: W. C. Stone, residence [26] Goldfield, Nevada, Frank G. Hobbs, residence, Goldfield,

Nevada, and C. E. Wylie, residence, Goldfield, Nevada; that the capital stock of said corporation has been fully paid up and that there is no stock in the treasury of said corporation. That said corporation has liabilities in the sum of about Sixty-five Thousand Dollars ($65,000), and has assets, exceeding the sum of Ninety-five Thousand Dollars ($95,000); that among the creditors of said corporation defendant, and about the amounts owed to them, are: Pacific Hardware & Steel Co., San Francisco, California, in the sum of Fifteen Thousand Dollars; Giant Powder Company, Con., San Francisco, California, in the sum of Fifteen Thousand Dollars; J. R. Garrett, Marysville, California, in the sum of Ten Thousand ($10,000) Dollars; J. A. Folger & Company, San Francisco, California, in the sum of Two Thousand Eight Hundred Dollars ($2,800); Standard Oil Company, Sacramento, California, in the sum of Two Thousand Three Hundred Dollars ($2,300); and John S. Cook & Company of Goldfield, Nevada, in the sum of Sixteen Thousand Dollars ($16,000).

11. That, owing to the depressed condition in business, and the inability of said defendant corporation to the present time to collect the amounts owing to it, the said corporation is in danger of its assets being wasted through attachment or litigation, as the aforesaid claims and other claims are due, and the said corporation is liable at any time to be attached and therefore be unable to carry on and continue its business or to be put to very large and useless expense by way of litigation, and the assets of the property be wasted thereby.

That plaintiff is the holder of more than one-tenth (1/10) of the capital stock of the said corporation defendant, in his own name and person, fully paid up, and plaintiff avers that by reason of the facts aforesaid, the said corporation should be dissolved, and that a receiver should be appointed to take charge of the business affairs of said corporation, that its property may be preserved, its creditors paid, and its assets cared for.

Wherefore, plaintiff prays for the order of this Court appointing a receiver herein, to take charge of the affairs of said corporation, and conduct and manage the same, with a view to its dissolution, under the orders and directions of this Court, and that upon the filing of this complaint, [27] the Court appoint a receiver and fix the amount of bonds to be given by him upon his taking the oath of said appointment; that the Exploration Mercantile Company and the directors of said corporation, and each of them, be enjoined and restrained from exercising any of its powers or doing any business except through, by and under said receiver, and for such other and further relief as to the Court may seem meet and proper in the premises.

THOMPSON, MOREHOUSE & THOMPSON,
Attorneys for Plaintiff.

State of Nevada,
County of Esmeralda,—ss.

W. C. Stone, being first duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has heard read the foregoing complaint and knows the contents thereof, and the same is true of

his own knowledge, except as to the matters therein stated on his information or belief, and as to those matters, he believes it to be true.

WALTER C. STONE.

Subscribed and sworn to before me this 6th day of August, 1908.

[Seal] I. S. THOMPSON,
Notary Public."

And thereupon summons was duly issued and served upon C. E. Wylie, Manager of the said Exploration Mercantile Company, who then and in reply to said complaint, made appearance in writing in said State Court, as follows:

"*In the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda.*

W. C. STONE,

Plaintiff,

vs.

EXPLORATION MERCANTILE COMPANY (a Corporation),

Defendant.

Now comes C. E. Wylie, Manager and one of the Directors of the above-named defendant, and enters the appearance of the said defendant in the above-entitled cause, and asks the above-named Court to appoint as receiver of said defendant, C. E. Wylie, the undersigned, one of the directors of said corporation.

C. E. WYLIE, [28]
Manager and Director of the Exploration Mercantile Company."

That the petition or complaint of said W. C. Stone was filed under and by virtue of Sec. 94, of the laws of the State of Nevada, relating to corporations; that said Exploration Mercantile Company was created, organized and transacting business as a corporation at Goldfield aforesaid, as a Nevada corporation, and that under said law aforesaid, the person to be appointed by said State Court, as Receiver, unless attacked as to his qualifications, had to be one of the Directors of the corporation and that C. E. Wylie was such director; that upon the entering of such appearance for said corporation, by said C. E. Wylie, the said Court made and entered the following order:

"*In the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda.*

W. C. STONE,

Plaintiff,

vs.

EXPLORATION MERCANTILE COMPANY (a Corporation),

Defendant.

Upon reading and filing the verified complaint of the plaintiff herein, and it appearing therefrom that the plaintiff is the owner and holder of over one-tenth of the capital stock of the Exploration Mercantile Company; that the assets of said corporation are in danger of waste through attachment, and litigation, and that such corporation should be dissolved, and a receiver appointed to take charge and manage and control the affairs of said corporation, and it ap-

pearing to be a proper case for the appointment of a receiver;

Now, by authority of an act of the legislature of the State of Nevada, entitled 'An Act providing a general corporation law,' approved March 16th, 1908, it is ordered that the said corporation be and is, so far as these proceedings are concerned, hereby dissolved; and that C. E. Wylie be appointed a receiver in the above-entitled proceedings, with full power to take charge of the assets, control and business of the Exploration Mercantile Company (a corporation) transacting business at Goldfield, in the [29] County of Esmeralda, State of Nevada, and to immediately list and report to the Court all the assets of said corporation, and its entire liabilities and to do any and all things as ordered and directed by this Court, and that he execute a bond for the faithful performance of his duties as such receiver in the sum of $50,000.00; that upon the approval and filing of such bond in the sum aforesaid, and taking the oath of office, as required by law, the aforesaid C. E. Wylie be, and he is hereby appointed receiver of the corporation defendant, to wit, The Exploration Mercantile Company, with full power to take charge of the business of said corporation and conduct the same and institute any and all suits for the collection of the assets of said company.

FRANK P. LANGAN,
Judge.

Dated at Goldfield, Nevada, this 6th day of August, 1908."

That in pursuance of said order, the said C. E. Wylie gave due and proper bond, and took oath of

office as such Receiver, and took into his possession the estate of said Exploration Mercantile Company, and commenced to carry on and conduct the business of said corporation, as Receiver of said court and as the officer of said court and not otherwise; that in the meantime the said corporation and its officers, were by the orders of said State Court, enjoined from acting, and the said corporation and its said officers have not to affiant's knowledge acted since that time, except to appear and defend in the bankruptcy proceedings in this court; that said affiant appeared and acted in said State Court as one of the attorneys for said Stone, and also as one of the attorneys for said Receiver, with permission of said State Court, the interests therein not being conflicting, and has not at any time represented any other parties herein in said State Court in said proceeding; that said proceeding in said State Court was not a proceeding upon a debt or claim provable or dischargeable in bankruptcy, and therefore affiant honestly and conscientiously believed, and still believes, that the proceeding in said State Court was one within the jurisdiction of said State Court, and that said State Court had full and complete jurisdiction of the subject matter and of the person of the defendant corporation, and that this Hon. Court in bankruptcy had no authority or jurisdiction to issue an [30] injunction or stay proceedings in said State Court; that thereafter on the —— day of September, 1908, this Hon. Court, sitting in bankruptcy, upon the application of the petitioners in this bankruptcy proceeding, as set forth in P. F. Carney's affidavit herein, made an order as follows, to wit:

"In the District Court of the United States, in and for the District of Nevada.

IN BANKRUPTCY.

In the Matter of EXPLORATION MERCANTILE COMPANY (a Corporation), an Alleged Bankrupt.

And now, this 12th day of September, 1908, on motion of said attorneys, it appearing to the Court that there is danger of irreparable injury to the creditors of the said debtor, unless the act sought to be enjoined is at once restrained, it is ordered that the above motion be heard at a session of said court, to be held at the City of Carson, on the 18th day of September, A. D. 1908, at 10 A. M.; and it is further ordered that, until the decision of this Court upon the said motion, the said parties against whom an injunction is prayed be restrained and they are hereby commanded, under such penalties as are inflicted by the laws of the United States, to abstain from the sale of, or in any other manner whatever disposing of the property or estate or any part thereof of the above-named Exploration Mercantile Company, a corporation.

E. S. FARRINGTON, Judge."

That affiant is not and was not aware of any other or further order of this Hon. Court, and affiant construed said order to be a stay order and not an order for an injunction, and then believed, and still believes, that this Hon. Court never made any order issuing or causing to be issued any injunction; that

affiant then construed the bankrupt law to mean that this Hon. Court had no power or authority to issue any stay order or injunction in the premises, because the proceedings in the State Court was not upon a claim or demand, provable or dischargeable in bankruptcy, and that therefore that said stay order was void and not lawful; that on the 18th day of September, A. D. 1908, H. V. Morehouse, a partner of affiant, appeared in this Hon. Court, and presented objections to said order, and orally argued the same before this Hon. Court, and as affiant is informed and believes this Hon. Court, took the same after argument under advisement, and this affiant is [31] not aware of any decision in the premises, and affiant further states that he knows of no order of any kind continuing said motion, or that said motion was otherwise heard, than as to affiant's objection to the same and demand by argument that the same be set aside as beyond the power of the court to make in the premises; that prior to the filing of the petition in bankruptcy herein, the said State Court through its said Receiver was conducting and carrying on the business of said corporation; that the building in which the corporation was conducting its business was not the property of said corporation, but that the corporation was a lessee, and that the rentals thereof of which said corporation should pay for the occupancy thereof was at that time and during all the times set out in P. F. Carney's affidavit was reasonably worth the sum of $500.00 per month, and that corporation had not paid any rentals as affiant is informed and believes, and

demand was being made by W. C. Stone, owner of said building, that the rentals be paid, and if not paid that said Receiver move therefrom, or suit would be brought to enforce the collection thereof and the recovery of triple damages as provided by the laws of the State of Nevada; that at this time no adjudication in bankruptcy had taken place in this Hon. Court, and the petitioning creditors herein gave no bond or undertaking so as to take possession of the assets of the corporation, and therefore so as to take possession of the assets of the corporation, and therefore as affiant believed and still believes no application could be made to this Court to have the matter of rent adjusted or paid, and as the property was in the possession of the State Court and never taken from it by this Court or any officer of this Court, it had to be looked after and preserved, stored and cared for, and therefore under these circumstances and none other said affiant believing that he was acting wisely and in the best interest of all concerned and lawfully and in obedience of his duty and not otherwise, did advise that said rentals be paid, because affiant knew that no other place could be procured for the storing and safekeeping of the assets of said corporation and to do so, would require the employment of men to be paid, the payment of rents and other expenditures, and still leave the aforesaid rentals due and unpaid, to be adjusted either in the State Court or this Court, and [32] further that any failure upon the part of said Receiver of said State Court, as he was the officer of that Court and held the possession of said property as such officer

and not otherwise, would make said Receiver liable upon his official bond, and said affiant, as the attorney for said Receiver and an officer of said State Court, would be recreant to his duty as such attorney not to advise and protect said Receiver as an officer of said Court, and affiant was compelled to choose and act, as he believed to be his sworn duty as an attorney at law in the premises, and then believed, and still believes, he acted rightly, and his action in the premises was with no intent to be disrespectful or to disobey or set at naught the order of this Court, and then believed, and still believes, he acted wisely and justly, and this accounts for the payment by said Receiver to said Stone of the said amount of $3,000.00 set out in the affidavit of said P. F. Carney. That at the time said payments were made by said Receiver this affiant believed that the same were for the best interests of said estate, and that the same were authorized by the law and by the order of the state court in appointing said receiver. It is true, that in connection with H. V. Morehouse, the law firm of Thompson, Morehouse & Thompson, has received from said C. E. Wylie the sum of $1,000.00, but says that the said State Court, prior to the payment thereof, made an order in writing directing the said Receiver as the officer of said State Court to pay said sum to the law firm of said Thompson, Morehouse & Thompson, as attorneys' fees for services rendered as attorneys for said Receiver and to be rendered; that affiant then fully believed, and still believes, that as the proceeding in the State Court was not upon a claim or demand dischargeable in

bankruptcy, and as the receiver in said State Court was the officer of said State Court, and acting only in that capacity and was not made a party to the proceeding in bankruptcy, that the said State Court had sole and separate jurisdiction in the premises, and this Hon. Court had no jurisdiction or authority to stay the proceeding in said State Court or enjoin said Receiver in said State Court, and that services for which affiant was paid by said Receiver was solely for said Receiver and not in behalf of or for said corporation, and so believing and so construing the law, and without any prejudice or unkindly feeling to this [33] Hon. Court, but in good faith, and fully believing that he was entitled to said fee, and that the same could be legally allowed by said State Court, and properly paid by said Receiver and that the same was not in violation of the power of this Hon. Court in the premises, the affiant so acted and not otherwise. And denies that he was willfully or contemptuously violating said order of this Hon. Court. That on, to wit, the 26th day of January, 1909, upon petition of W. P. Fuller & Co., a creditor of said Exploration Mercantile Company, filed a petition in said State Court, and obtained an order of said State Court commanding the said Receiver to within twenty days to file a complete inventory, and true valuation of the property in his hands and a complete statement of his expenditures as such Receiver, and that under said order said Receiver complied therewith, and the said statement and account came on to be heard, and the same was heard and thereupon the said State Court, among

other things, made the following order, to wit:

"And the said C. E. Wylie, as Receiver herein, is hereby directed and ordered to give notice to the Creditors of said Exploration Mercantile Company by publication in the 'Goldfield Chronicle,' a daily newspaper printed and published at Goldfield, in the town of Goldfield, County of Esmeralda, State of Nevada, for one week, that said Creditors appear and show cause, if any they have, before this Court, on the 15th day of March, 1909, at the courtroom of this court, in the courthouse, at the hour of 10 o'clock A. M. of that day. First: Why an order should not be made by this Court allowing and approving the accounts of receipts and disbursements made and filed herein by said Receiver; and Second: Why an order should not be made by this Court commanding and directing said C. E. Wylie, Receiver aforesaid, to sell at public or private sale the assets of said corporation, pay the creditors thereof, and wind up the affairs of said corporation. And it is further ordered that said Receiver shall notify further all the creditors who have filed their claims herein by sending to them personally through the United States mail a printed slip of said publication aforesaid, at lease fifteen days before the day set herein for hearing. Dated February 24th, 1909.

PETER J. SOMERS,
Judge." [34]

That in pursuance of said order, said Receiver gave the aforesaid notice by publication and by mail as therein provided; that no order of sale was ever entered in said Court; that prior to these proceed-

ings the said petitioning creditors had each of them filed and presented their several claims, and demands, duly verified by them, to and with said Receiver, saving and reserving in the same the following reservations: "does not waive or relinquish, but expressly reserves its legal rights as petitioning creditors, to proceed with its petition, and to have said Exploration Mercantile Company declared and adjudged a bankrupt in that certain bankruptcy proceeding now pending in the District Court of the United States in and for the District of Nevada, entitled 'In the Matter of the Exploration Mercantile Company, a corporation, an alleged bankrupt,' being No. 103, on the files of said District Court of the United States"; that no other objection to the proceedings in said State Court was made in the filing of their claims.

That on or about the 18th day of March, A. D. 1909, the following creditors of the Exploration Mercantile Company, to wit, Pacific Hardware & Steel Co., Giant Powder Company, Consolidated, J. A. Folger & Co., J. R. Garrett Co., Standard Oil Co., Western Fuel Co., Holbrook, Merrill & Stetson, John A. Roebling's Sons Co., Shea Bocquerax Co., American Biscuit Co., Nathan, Dohrmann Co., Sunlit Fruit Co., of West Berkeley, and James DeFremery & Co., duly served and filed a motion and notice of motion in the District Court of the Seventh Judicial District of the State of Nevada, in and for the County of Esmeralda, in the case entitled Walter C. Stone vs. The Exploration Mercantile Company, a corporation, wherein they asked an order of said

Court removing and discharging the receiver C. E. Wylie, heretofore appointed by said Court upon several grounds among which was the following: "4th: That C. E. Wylie, Receiver, has, since his appointment as Receiver of the Defendant, Exploration Mercantile Company, paid out and expended large sums of money without any authorization or authority so to do as such Receiver, or without obtaining any order of court for the payment of the same, and that the expenditure of said large sums of money has depleted said estate and has become a total loss to the same." That thereafter, upon the said motion of said creditors, the Court rendered its decision [35] and denied said motion. That in denying said motion the Court, in reference to the attorneys' fees paid by said Receiver as set forth in P. F. Carney's affidavit, said in part: "It is true that he has employed counsel at his own instance and has paid them the sum of $1,000.00, but the law certainly gives him such right, when his duties convince him that he needs legal advice, and assistance, and the evidence clearly shows that he needed attorneys and that he refused to pay them unless the Court ordered such payment, and that the Court made an order authorizing the payment of $1,000.00, to his attorneys,—that the sum of $1,000 was an extremely reasonable sum to be paid his attorneys for services rendered up to the time of such payment."

And in reference to the payment of the rent by said Receiver as set forth in said affidavit, the Court said: "Such payment would not be misconduct, and particularly when he was confronted with a difficulty

that he could not readily get another place to store the goods, and that the rent had to be paid or else removed, but nevertheless the reasonableness of such payment is a matter to be finally disposed of in his final account, and the creditors cannot in any event be injured by such payment, when the facts are that he has not paid any rents whatever since that time, and it can hardly be contended that the landlord will not be entitled to a reasonable rental for his premises while occupied as they are and necessarily must be until the final determination of this cause. There is nothing in the evidence which shows that at any time the acts of the Receiver or his attorneys have been antagonistic or prejudicial to any of the creditors; on the contrary, the evidence shows that their efforts have been directed solely to have the administration of this estate conducted under the supervision of this Court, in this proceeding, and if they had not been interfered with that these objecting creditors would be to-day in much better position than they now are. Upon the whole matter of this motion, I am fully convinced that the motion is without merit, and that C. E. Wylie, Receiver, herein has at all times acted properly, prudently, and with sound judgment, free from bias or prejudice, and that he was and is a proper person to be Receiver in this action, and that he has always acted honestly and impartially, and is in every way a suitable and proper person to discharge the duties of his trust. The motion to remove the Receiver is denied." That by the filing of such [36] claims by said creditors, and the said motion to remove said Re-

ceiver in said State Court, they would waive and did waive all objections to the jurisdiction of said State Court. And affiant believed it was his duty to obey the order of said State Court, and he only thus acted and not otherwise, and in all his acts he has had and still has the highest and sincerest regard for the Judge of this Hon. Court, and the greatest respect for the Court over which he presides, but then believed, and still believes, that in the matter and things for which he is charged as in contempt in this proceeding the said State Court had jurisdiction and that it was his duty to obey said Court, and to comply with its orders, and in so doing affiant avers that he is not guilty of contempt of this Court, and that in all his acts in the premises he has acted in good faith, and with no intent to contemptuously disobey the orders of this Hon. Court, and therefore respectfully prays this Hon. Court to dismiss proceedings against him.

I. S. THOMPSON.

Subscribed and sworn to before me this 21st day of May, A. D. 1910.

[Seal] EDWARD T. PATRICK,
Notary Public in and for the County of Esmeralda, State of Nevada.

[Indorsed]: In the District Court of the United States, in and for the District of Nevada. In the Matter of the Exploration Mercantile Company (a Corporation), Bankrupt, and the application of P. F. Carney, Esq., in Said Proceeding by Affidavit, and the Order of Hon. E. S. Farrington, Judge of Said

Court, of Date July 9th, 1909, issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc. Affidavit of I. S. Thompson. Filed May 26, 1910, at 10:15 o'clock A. M. T. J. Edwards, Clerk.

[Affidavit of H. V. Morehouse Answering Affidavit of P. F. Carney.]

In the District Court of the United States, in and for the District of Nevada.

In the Matter of the EXPLORATION MERCANTILE COMPANY (a Corporation), Bankrupt, and the Application of P. F. Carney, Esq., in Said Proceeding by Affidavit, and the Order of Hon. E. S. Farrington, Judge of Said Court, of Date July 9th, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson, and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of a Contempt, etc.

Comes now H. V. Morehouse, in his own behalf, and answering said affivavit of said P. F. Carney, and begs leave to reply thereto to show the [37] following causes why he should not be adjudicated guilty of contempt, and first as to the facts, and second as to the law.

United States of America,
State of Nevada,—ss.

H. V. Morehouse, being first duly sworn, says that he is a regular practicing attorney, duly admitted to practice law in the Supreme Court of the State of

Nevada, and in the United States District Court in and for the State of Nevada, and the United States Circuit for the Ninth Circuit and the United States Circuit Court of Appeals for the Ninth Circuit and in the Supreme Court of the United States; that he resides at the town of Goldfield in the County of Esmeralda, State of Nevada, and is a member of the law firm, at Goldfield aforesaid, of Thompson, Morehouse & Thompson, consisting of I. S. Thompson, H. V. Morehouse and J. G. Thompson, and has been such member of said firm since the 15th day of August, 1906; that on the 6th day of August, 1908, W. C. Stone filed in the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda, his complaint in writing, in the words and figures following, to wit:

"*In the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda.*

W. C. STONE,

Plaintiff,

vs.

EXPLORATION MERCANTILE COMPANY,

Defendant.

The plaintiff complaining of the defendant alleges: 1. That the defendant is a corporation organized and existing under and by virtue of the laws of the State of Nevada, with its principal place of business at Goldfield, in the County of Esmeralda, State of Nevada; that the defendant, as such corporation, has a capital stock of Fifty Thousand ($50,000), divided

into fifty thousand (50,000) shares of the par value of One ($1.00) dollar per share; that the officers of said corporation are the plaintiff, President; C. E. Wylie, Vice-President; and Frank G. Hobbs, Secretary and Treasurer; the directors of said company are: W. C. Stone, residence, [38] Goldfield, Nevada; Frank G. Hobbs, residence, Goldfield, Nevada; and C. E. Wylie, residence, Goldfield, Nevada; that the capital stock of said corporation has been fully paid up and that there is no stock in the treasury of said corporation. That said corporation has liabilities in the sum of about Sixty-five Thousand Dollars ($65,000), and has assets, exceeding the sum of Ninety-five Thousand Dollars ($95,000); that among the creditors of said corporation defendant, and about the amounts owed to them, are: Pacific Hardware & Steel Co., San Francisco, California, in the sum of Fifteen Thousand Dollars; Giant Powder Company, Con., San Francisco, California, in the sum of Fifteen Thousand Dollars; J. R. Garrett, Marysville, California, in the sum of Ten Thousand ($10,000) Dollars; J. A. Folger & Company, San Francisco, California, in the sum of Two Thousand Eight Hundred Dollars ($2,800); Standard Oil Company, Sacramento, California, in the sum of Two Thousand Three Hundred Dollars ($2,300); and John S. Cook & Company of Goldfield, Nevada, in the sum of Sixteen Thousand Dollars ($16,000).

11. That, owing to the depressed condition in business, and the inability of said defendant corporation to the present time to collect the amounts owing to it, the said corporation is in danger of its

assets being wasted through attachment or litigation, as the aforesaid claims and other claims are due, and the said corporation is liable at any time to be attached and therefore be unable to carry on and continue its business or to be put to very large and useless expense by way of litigation, and the assets of the property be wasted thereby.

That plaintiff is the holder of more than one-tenth (1/10) of the capital stock of the said corporation defendant, in his own name and person, fully paid up, and plaintiff avers that by reason of the facts aforesaid, the said corporation should be dissolved, and that a receiver should be appointed to take charge of the business affairs of said corporation, that its property may be preserved, its creditors paid, and its assets cared for.

Wherefore, plaintiff prays for the order of this Court, appointing a receiver herein, to take charge of the affairs of said corporation, and conduct and manage the same, with a view to its dissolution, under the orders and directions of this Court, and that upon the filing of this complaint, [39] the Court appoint a receiver and fix the amount of bonds to be given by him upon his taking the oath of said appointment; that the Exploration Mercantile Company and the directors of said corporation, and each of them, be enjoined and restrained from exercising any of its powers or doing any business except through, by and under said receiver, and for such other and further relief as to the Court may seem meet and proper in the premises.

THOMPSON, MOREHOUSE & THOMPSON,

Attorneys for Plaintiff.

State of Nevada,
County of Esmeralda,—ss.

W. C. Stone, being first duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has heard read the foregoing complaint, and knows the contents thereof, and the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and as to those matters, he believes it to be true.

WALTER C. STONE.

Subscribed and sworn to before me this 6th day of August, 1908.

[Seal] I. S. THOMPSON,
Notary Public."

And thereupon summons was duly issued and served upon C. E. Wylie, Manager of the said Exploration Mercantile Company, who then and in reply to said complaint made appearance in writing in said State court, as follows:

"*In the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda.*

W. C. STONE,
Plaintiff,

vs.

EXPLORATION MERCANTILE COMPANY (a Corporation),
Defendant.

Now comes C. E. Wylie, Manager and one of the Directors of the above-named defendant, and enters

the appearance of the said defendant in the above-entitled cause, and asks the above-named court to appoint as receiver of said defendant, C. E. Wylie, the undersigned, one of the directors of said corporation.

C. E. WYLIE, [40]

Manager and Director of the Exploration Mercantile Company."

That the petition or complaint of said W. C. Stone, was filed under and by virtue of sec. 94, of the laws of the State of Nevada, relating to corporations; that said Exploration Mercantile Company was created, organized and transacting business as a corporation at Goldfield aforesaid, as a Nevada corporation, and that under said law aforesaid, the person to be appointed by said State Court, as Receiver, unless attacked as to his qualifications, had to be one of the Directors of the corporation and that C. E. Wylie was such director; that upon the entering of such appearance for said corporation, by said C. E. Wylie, the said Court made and entered the following order:

"*In the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda.*

W. C. STONE,

Plaintiff,

vs.

EXPLORATION MERCANTILE COMPANY (a Corporation),

Defendant.

Upon reading and filing the verified complaint of the plaintiff herein, and it appearing therefrom that the plaintiff is the owner and holder of over one-tenth of the capital stock of the Exploration Mercantile Company; that the assets of said corporation are in danger of waste through attachment, and litigation, and that such corporation should be dissolved, and a receiver appointed to take charge and manage and control the affairs of said corporation, and it appearing to be a proper case for the appointment of a receiver;

Now, by authority of an act of the legislature of the State of Nevada, entitled 'An Act providing a general corporation law,' approved March 16th, 1908, it is ordered that the said corporation be and is, so far as these proceedings are concerned, hereby dissolved; and that C. E. Wylie be appointed a receiver in the above-entitled proceedings, with full power to take charge of the assets, control and business of the Exploration Mercantile Company (a corporation) transacting business at Goldfield, in the [41] County of Esmeralda, State of Nevada, and to immediately list and report to the Court all the assets of said corporation, and its entire liabilities and to do any and all things as ordered and directed by this Court, and that he execute a bond for the faithful performance of his duties as such receiver in the sum of $50,000.00; that upon the approval and filing of such bond in the sum aforesaid, and taking the oath of office, as required by law, the aforesaid C. E. Wylie be, and he is hereby, appointed receiver of the corporation defendant to wit, The Exploration

Mercantile Company, with full power to take charge of the business of said corporation and conduct the same and institute any and all suits for the collection of the assets of said company.

FRANK P. LANGAN,
Judge.

Dated at Goldfield, Nevada, this 5th day of August, 1908."

That in pursuance of said order, the said C. E. Wylie gave due and proper bond, and took oath of office as such Receiver, and took into his possession the estate of said Exploration Mercantile Company, and commenced to carry on and conduct the business of said corporation, as Receiver of said court and as the officer of said court and not otherwise; that in the meantime the said corporation and its officers were by the orders of said State Court enjoined from acting, and the said corporation and its said officers have not to affiant's knowledge acted since that time, except to appear and defend in the bankruptcy proceedings in this court; that said affiant appeared and acted in said State Court as one of the attorneys for said Stone, and also as one of the attorneys for said Receiver, with permission of said State Court, the interests therein not being conflicting, and has not at any time represented any other parties herein in said State Court in said proceeding; that said proceeding in said State Court was not a proceeding upon a debt or claim provable or dischargeable in bankruptcy, and therefore affiant honestly and conscientiously believed, and still believes, that the proceeding in said State Court was

one within the jurisdiction of said State Court, and that said State Court had full and complete jurisdiction of the subject matter and of the person of the defendant corporation, and that this Hon. Court in Bankruptcy had no authority or jurisdiction to issue an [42] injunction or stay proceedings in said State Court; that thereafter on the —— day of September, 1908, this Hon. Court, sitting in bankruptcy, upon the application of the petitioners in this bankruptcy proceeding, as set forth in P. F. Carney's affidavit herein, made an order as follows, to wit:

"*In the District Court of the United States, in and for the District of Nevada.*

IN BANKRUPTCY.

In the Matter of EXPLORATION MERCANTILE COMPANY (a Corporation), an Alleged Bankrupt.

And now, this 12th day of September, 1908, on motion of said attorneys, it appearing to the Court that there is danger of irreparable injury to the creditors of the said debtor, unless the act sought to be enjoined is at once restrained, it is ordered that the above motion be heard at a session of said court, to be held at the City of Carson, on the 18th day of September, A. D. 1908, at 10 A. M.; and it is further ordered that until the decision of this Court upon the said motion, the said parties against whom an injunction is prayed be restrained and they are hereby commanded, under such penalties as are inflicted by the laws of the United States, to abstain

from the sale of, or in any other manner whatever disposing of the property or estate or any part thereof of the above-named Exploration Mercantile Company, a corporation.

E. S. FARRINGTON,
Judge."

That affiant is not and was not aware of any other or further order of this Hon. Court, and affiant construed said order to be a stay order and not an order for an injunction, and then believed, and still believes, that this Hon. Court never made any order issuing or causing to be issued any injunction; that affiant then construed the bankrupt law to mean that this Hon. Court had no power or authority to issue any stay order or injunction in the premises, because the proceedings in the State Court was not upon a claim or demand, provable or dischargeable in bankruptcy, and that therefore that said stay order was void and not lawful; that on the 18th day of September, A. D. 1908, said affiant appeared in this Hon. Court, and presented objections to said order, and orally argued the same before this Hon. Court, and as affiant is informed and believes this Hon. Court took the same after argument under advisement, and he is [43] not aware of any decision in the premises, and affiant further states that he knows of no order of any kind continuing said motion, or that said motion was otherwise heard, than as to affiant's objection to the same and demand by argument that the same be set aside as beyond the power of the Court to make in the premises; that prior to the filing of the petition in bankruptcy herein, the said State Court through

its said Receiver was conducting and carrying on the business of said corporation; that the building in which the corporation was conducting its business was not the property of said corporation, but that the corporation was a lessee, and that the rentals thereof of which said corporation should pay for the occupancy thereof was at that time and during all the times set out in P. F. Carney's affidavit was reasonably worth the sum of $500.00 per month, and that corporation had not paid any rentals as affiant is informed and believes, and demand was being made by W. C. Stone, owner of said building, that the rentals be paid, and if not paid, that said Receiver move therefrom, or suit would be brought to enforce the collection thereof and the recovery of triple damages as provided by the laws of the State of Nevada; that at this time no adjudication in bankruptcy had taken place in this Hon. Court, and the petitioning creditors herein gave no bond or undertaking so as to take possession of the assets of the corporation, and therefore, as affiant believed, and still believes, no application could be made to this Court to have the matter of rent adjusted or paid, and as the property was in the possession of the State Court and never taken from it by this court or any officer of this court, it had to be looked after and preserved, stored and cared for, and therefore under these circumstances and none other said affiant believing that he was acting wisely and in the best interest of all concerned and lawfully and in obedience of his duty, and not otherwise, did advise that said rentals be paid, because affiant knew that no other place could be procured for the storing and

safekeeping of the assets of said corporation, and to do so, would require the employment of men to be paid, the payment of rents and other expenditures, and still leave the aforesaid rentals due and unpaid, to be adjusted either in the State Court or this court, and [44] further, that any failure upon the part of said Receiver of said State Court, as he was the officer of that court and held the possession of said property as such officer and not otherwise, would make said Receiver liable upon his official bond, and said affiant, as the attorney for said Receiver and an officer of said State Court, would be recreant to his duty as such attorney not to advise and protect said Receiver as an officer of said court, and affiant was compelled to choose and act, as he believed to be his sworn duty as an attorney at law in the premises, and then believed, and still believes, he acted rightly, and his action in the premises was with no intent to be disrespectful or to disobey or set at naught the order of this Court, and then believed, and still believes, he acted wisely and justly, and this accounts for the payment by said Receiver to said Stone of the said amount of $3,000.00 set out in the affidavit of said P. F. Carney. It is true that affiant did advise said C. E. Wylie to collect outstanding claims and sums due and owing said corporation, because the conditions surrounding Goldfield at the time were such that unless collections were made, the same would be lost to the corporation by reason of the debtors leaving Goldfield or getting in a condition to make the debtors financially irresponsible, and because said affiant was not then nor is he now aware of any order of this

Court, prohibiting the collection of money or conserving the estate of the corporation. It is true that in connection with I. S. Thompson, he has received from said C. E. Wylie the sum of $1,000.00, but says that the said State Court, prior to the payment thereof, made an order in writing directing the said Receiver as the officer of said State Court to pay said sum to the law firm of said Thompson, Morehouse & Thompson, as attorneys' fees for services rendered as attorneys for said Receiver, and to be rendered; that affiant then fully believed, and still believes, that as the proceeding in the State Court was not upon a claim or demand dischargeable in bankruptcy, and as the receiver in said State Court was the officer of said State Court, and acting only in that capacity and was not made a party to the proceeding in bankruptcy, that the said State Court had sole and separate jurisdiction in the premises, and this Hon. Court had no jurisdiction or authority to stay the proceeding in said State Court or enjoin said Receiver in said [45] State Court, and that services for which affiant was paid by said Receiver was solely for said receiver and not in behalf of or for said corporation, and so believing and so construing the law, and without any prejudice or unkindly feeling to this Hon. Court, but in good faith and fully believing that he was entitled to said fee, and that the same could be legally allowed by said State Court and properly paid by said Receiver, and that the same was not in violation of the power of this Hon. Court in the premises, the affiant so acted and not otherwise. And denies that he has wilfully or contemptuously violated said order of

this Hon. Court; denied that he has at any time advised the Hon. Peter J. Somers "to pay no attention to the action of the Federal Court," but in that behalf says, that on, to wit, the 26th day of January, 1909, upon petition of W. P. Fuller & Co., a creditor of said Exploration Mercantile Company, filed a petition in said State Court, and obtained an order of said State Court commanding the said Receiver to within twenty days to file a complete inventory, and true valuation of the property in his hands and a complete statement of his expenditures as such Receiver, and that under said order said Receiver complied therewith, and the said statement and account came on to be heard, and the same was heard and thereupon the said State Court, among other things, made the following order, to wit: "And the said C. E. Wylie, as Receiver herein, is hereby directed and ordered to give notice to the Creditors of said Exploration Mercantile Company by publication in the 'Goldfield Chronicle,' a daily newspaper printed and published at Goldfield, in the town of Goldfield, County of Esmeralda, State of Nevada, for one week, that said creditors appear and show cause, if any they have, before this Court, on the 15th day of March, 1909, at the courtroom of this court, in the courthouse, at the hour of 10 o'clock A. M. of that day,

First: Why an order should not be made by this Court allowing and approving the accounts of receipts and disbursements made and filed herein by said Receiver; and Second: Why an order should not be made by this Court commanding and directing said C. E. Wylie, Receiver aforesaid, to sell at public or

private sale the assets of said corporation, pay the creditors thereof, and wind up the affairs of said corporation. And it is further [46] ordered that said Receiver shall notify further all the creditors who have filed their claims herein by sending to them personally through the United States mail, a printed slip of said publication aforesaid, at least fifteen days before the day set herein for hearing. Dated February 24th, 1909.

PETER J. SOMERS, Judge."

That in pursuance of said order, said Receiver gave the aforesaid notice of publication and personally as therein provided, that no order of sale was ever entered in said court; that prior to these proceedings the said petitioning creditors had each of them filed and presented their several claims, and demands, duly proved by them, to and with said Receiver, saving and reserving in the same the following reservations: "does not waive or relinquish, but expressly reserves its legal rights as petitioning creditor, to proceed with its petition, and to have said Exploration Mercantile Company declared and adjudged a bankrupt in that certain bankruptcy proceeding now pending in the District Court of the United States in and for the District of Nevada, entitled 'In the matter of the Exploration Mercantile Company, a corporation, an alleged bankrupt,' being No. 103, on the files of said District Court of the United States"; that no other objection to the proceedings in said State Court was made in the filing of their claims, and therefore affiant fully believed that said petitioners and the other creditors would have no objection to a sale of said

property, and that the proceeds thereof could be held and the expenses and costs saved, to all concerned, and that by notifying all the creditors they could present such objections thereto as they might think proper, and that by the filing of such claim these creditors would waive and did waive all objections to the jurisdiction of said State Court, and further, that said stay order in this Hon. Court was not binding upon the said Receiver or said State Court, because said Receiver was not a party to the proceedings herein in bankruptcy, and the suit pending in said State was not a suit stayed by the proceedings in bankruptcy or one that this Hon. Court could stay, and the only advice the affiant ever gave to said Peter J. Somers was to argue in said State Court the law in the premises as he, affiant, understood it, and still understands it, and affiant avers it was his duty to present to said [47] State Court the law as he understood it, and to obey the orders of said State Court, and he only thus acted and not otherwise, and in all his acts he has had and still has the highest and sincerest regard for the Judge of this Hon. Court, but then believed, and still believes, that in the matters and things for which he is charged as in contempt in this proceeding the said State Court had jurisdiction, and that it was his duty to obey said court, and to comply with its orders, and in so doing affiant avers that he is not guilty of contempt of this Court and that in all his acts in the premises he had acted in good faith, and with no intent to contemptuously disobey the orders of this Hon. Court, and therefore respect-

fully prays this Hon. Court to dismiss these proceedings against him.

H. V. MOREHOUSE.

Subscribed and sworn to before me this 20th day of May, A. D. 1910.

[Seal] I. S. THOMPSON,
Notary Public, in and for County of Esmeralda, State of Nevada.

[Endorsed]: In the District Court of the United States, in and for the District of Nevada. In the Matter of the Exploration Mercantile Company, (a Corporation), Bankrupt, and the Application of P. F. Carney, Esq., in said Proceeding by Affidavit, and the Order of Hon. E. S. Farrington, Judge of Said Court, of Date July 9th, 1909, Issued to W. C. Stone, C. E. Wylie, Frank Hobbs, I. S. Thompson, and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc. Affidavit of H. V. Morehouse. Filed May 26, 1910, at 10:15 o'clock A. M. T. J. Edwards, Clerk. No. 103.

[Affidavit of C. E. Wylie Answering Affidavit of P. F. Carney.]

In the District Court of the United States in and for the District of Nevada.

In the Matter of the EXPLORATION MERCANTILE COMPANY (a Corporation), Bankrupt, and the Application of P. F. Carney, Esq., in Said Proceeding by Affidavit and the Order of Hon. E. S. Farrington, Judge of Said Court, of Date July 9th, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S.

Thompson and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc.

Comes now C. E. Wylie, in his own behalf, and answering the affidavit of P. F. Carney, begs leave to present this his answer to the order to show cause:

United States of America,
State of Nevada,—ss.

C. E. Wylie, being [48] duly sworn, says: That he has read the affidavits of H. V. Morehouse and I. S. Thompson herein, and knows the contents thereof, and that the same are true, and that he hereby adopts the same and makes the same a part of this affidavit and states that all his acts and conduct in the premises were solely as the Receiver of said State Court, and not otherwise; that he never at any time acted for or as an officer of said corporation in the proceedings in the said State Court, and that all his acts were under oral or written instructions of said State Court; that he has the highest regard and respect for this Hon. Court, and denies that he has ever at any time by thought or deed, wilfully or purposely disobeyed the order or orders of this Court, except in so far that as the officer of said State Court under oath and bond to said State Court, he believed he was in duty bound to act in pursuance to his official position as such Receiver of said State Court. That he has never acted in the premises other than as such State Court receiver. Wherefore, affiant prays that this his answer be accepted and the order to show cause be vacated and he be hence dismissed.

C. E. WYLIE.

Subscribed and sworn to before me this 21st day of May, A. D. 1910.

[Seal] I. S. THOMPSON,
Notary Public in and for the County of Esmeralda, State of Nevada.

[Endorsed]: No. 103. In the District Court of the United States, in and for the District of Nevada. In the Matter of the Exploration Mercantile Company (a Corporation), Bankrupt, and the Application of P. F. Carney, Esq., in Said Proceeding by Affidavit, and the Order of Hon. E. S. Farrington, Judge of Said Court, of Date July 9th, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson, and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc. Affidavit of C. E. Wylie. Filed May 26th, 1910, at 10:15 o'clock A. M. T. J. Edwards, Clerk.

Re EXPLORATION MERCANTILE CO., Bankrupt.

Minutes of Court.

The matter of contempt of W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson, and H. V. Morehouse coming on regularly for hearing this day, Messrs. Detch & Carney, E. E. Roberts and J. L. Kennedy, appear for petitioning creditors; George S. Green, Esq., for respondents, [49] Wylie, Thompson and Morehouse. It was agreed and stipulated by counsel that the final order of the Court, in this matter, should apply to and bind the respond-

ents, Stone and Hobbs, who are without the district. On behalf of the respondents Mr. Green read and filed the separate affidavits of respondents, Morehouse, Thompson and Wylie; and offered in evidence all the records and files in this case. Mr. Carney read and offered his affidavit, filed July 9th, 1909, the original subpoena issued herein, with the Marshal's return of service, affidavit of P. F. Carney, filed May 17, 1909, and petitioning creditors' exhibit No. 10; also, "Testimony and Proceedings," in the State Court, filed herein this day. The matter was then argued by Mr. Green, on behalf of the respondents.

Re EXPLORATION MERCANTILE COMPANY, Bankrupt.

Minutes of Court.

On this day this matter was argued by Mr. Carney, on behalf of the petitioning creditors; and the same was thereupon submitted and taken under advisement, with leave to respondents to file their brief within thirty (30) days; the petitioning creditors to have ten days thereafter to reply, if desired.

[Findings and Decree.]

In the District Court of the United States, in and for the District of Nevada.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, a Bankrupt, and the Application of P. F. Carney, in Said Proceeding by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court, of

Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc.

[Order Adjudging Guilty of Contempt.]

This cause came on regularly to be heard on the 26th day of May, A. D. 1910, on the motion of the petitioning creditors, hereinafter named, upon the affidavits and evidence submitted by the respective parties, J. L. Kennedy, Detch & Carney and E. E. Roberts appearing as attorneys for The Giant Powder Company Consolidated, Pacific Hardware & Steel Company and [50] J. A. Folger & Company, said petitioning creditors, and George W. Green and H. V. Morehouse appearing as attorneys for said W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, and, after argument, oral and written, it appears to the Court, and it so finds:

That on the 12th day of September, 1908, the said petitioning creditors filed their petitions in the above-entitled court praying that the Exploration Mercantile Company, a corporation, be adjudged bankrupt within the purview of the acts of Congress relating to bankruptcy; that said Exploration Mercantile Company and C. E. Wylie, its receiver, be enjoined and restrained from disposing of its property, goods, wares and merchandise, or any part thereof; and that further proceedings in the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda, in the cause entitled "W. C. Stone, Plaintiff, vs. Exploration Mercantile Company, Defendant," be stayed pursuant to the bank-

ruptcy laws of the United States in such cases made and provided, and that an injunction be issued out of this Honorable Court directed to the said W. C. Stone, C. E. Wylie and Exploration Mercantile Company, restraining them, their agents, servants, attorneys and counselors from further prosecuting said suit in said State Court: That thereupon and on said 12th day of September, 1908, this Honorable Court made its two certain orders, copies of which are as follows to wit:

"*In the District Court of the United States in and for the District of Nevada.*

IN BANKRUPTCY.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, an Alleged Bankrupt.

United States of America,
District of Nevada,—ss.

The President of the United States of America, to W. C. Stone, C. E. Wylie and Exploration Mercantile Company, a Corporation, Greeting:

Whereas, a petition has been filed on the bankruptcy side of the District Court of the United States for the District of Nevada, praying for an injunction to restrain the prosecution of a certain suit pending in the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda, in which said W. C. Stone is plaintiff, and Exploration Mercantile Company is defendant, and has obtained an allowance for an injunction, as prayed for in said petition from the District Court of the

United States for the District of Nevada:

Now, therefore, we, having regard to the matters in said petition contained, do hereby command and strictly enjoin you, the said W. C. Stone, C. E. Wylie, and Exploration Mercantile Company, a corporation, or either of you, and each of your agents, servants, attorneys or counsellors, from further prosecuting said suit in said Court, and from taking any further steps or [51] proceeding in said action or suit now pending, as aforesaid, which commands and injunction you are respectively required to observe until our said District Court shall make further order in the premises. Hereof, fail not, under the penalty of law thence ensuing.

Witness, the Honorable E. S. FARRINGTON, District Judge of the United States for the District of Nevada, this 12th day of September, A. D. 1908, and in the hundred and thirty-third of the Independence of the United States of America.

[Seal] T. J. EDWARDS,
Clerk of Said Court."

"*In the District Court of the United States, in and for the District of Nevada.*

IN BANKRUPTCY.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, an Alleged Bankrupt.

Respectfully represents The Giant Powder Company Consolidated, a corporation, Pacific Hardware and Steel Company, a corporation, and J. A. Folger and Company, a corporation, that they are the peti-

tioners which have filed their petition in the above-entitled matter, praying that the said Exploration Mercantile Company, a corporation, be adjudicated a bankrupt. That said Exploration Mercantile Company, a corporation, has a stock of goods, wares and merchandise consisting of hardware, groceries and other merchandise in Goldfield, District of Nevada, a stock of similar goods at the town of Jamestown in said district, and another stock of similar merchandise at the town of Hornsilver in said District. That W. C. Stone, the President of said Exploration Mercantile Company has stated to petitioners that said corporation has been doing business at a considerable loss during the last four or five months next prior to the appointment of the receiver mentioned in the petition on file herein. That on or about the first day of August, 1908, said corporation advertised a sale of said merchandise at reduced prices and said receiver, C. E. Wylie, has informed your petitioners that said corporation for some days prior to the appointment of said receiver, and said receiver since that time, has been selling parts of said merchandise at greatly reduced prices. That said receiver has been procuring new merchandise and conducting the business and selling large quantities of goods. That in the petition filed in the District Court of the First Judicial District of the State of Nevada, mentioned in the petition on file herein, the said W. C. Stone prayed that receiver take charge of the affairs of said corporation, and conduct and manage the same with a view to its dissolution, and in the order made pursuant to said petition the said District Court ordered that the

said corporation be, as far as the proceedings therein are concerned, dissolved, and that C. E. Wylie be appointed receiver with full power to take charge of the assets, control and business of the Exploration Mercantile Company.

That said petitioners are fearful that said goods, wares and merchandise will be dissipated and that they will sustain irreparable injury unless an injunction or restraining order be entered herein enjoining or restraining the said Exploration Mercantile Company, a corporation, and said C. E. Wylie, receiver, as aforesaid, from selling or otherwise disposing of any of the property of said alleged bankrupt. The premises considered, they pray for an order enjoining and restraining the said Exploration Mercantile Company, a corporation, and C. E. Wylie, receiver as aforesaid, from disposing of said property, goods, wares and merchandise, or any part thereof.

E. E. ROBERTS,
ROBERT RICHARDS,
J. L. KENNEDY,
Attys. for Petitioners.

J. L. Kennedy says that he is one of the attorneys of record for the petitioners hereinbefore named, and that the statements contained in the foregoing petition are true, as he believes; that the reason this verification is not made by the petitioners is that each of the petitioners is a corporation duly organized and existing and having its principal place of business in the City and County of San Francisco, State of California, more than one hundred miles from the City of Carson, and that the deponent has been duly au-

thorized to make this verification.

J. L. KENNEDY.

Subscribed and sworn to before me by J. L. Kennedy this —— day of September, A. D. 1908.

[Seal] J. POUJADE,

Notary Public Within and for the County of Ormsby, State of Nevada."

State of Nevada." [52]

"*In the District Court of the United States, in and for the District of Nevada.*

IN BANKRUPTCY.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, an Alleged Bankrupt.

And now, this 12th day of September, 1908, on motion of said attorneys, it appearing to the Court that there is danger of irreparable injury to the creditors of the said debtor, unless the acts sought to be enjoined is at once restrained, it is ordered that the above motion be heard at a session of said court, to be held at the City of Carson, on the 18th day of September, A. D. 1908, at 10 A. M.; and it is further ordered that, until the decision of this Court upon the said motion, the said parties against whom an injunction is prayed be restrained, and they are hereby commanded, under such penalties as are inflicted by the laws of the United States to abstain from the sale of, or in any other manner whatever disposing of, the property or estate or any part

thereof of the above-named Exploration Mercantile Company, a corporation.

E. S. FARRINGTON,
Judge."

That thereafter said orders were placed in the hands of the United States Marshal for the District of Nevada for service and were duly and regularly served by him at the times and in the manner set forth in said Marshal's return annexed to the writ of subpoena on file with the clerk of this Court, a copy of which said return is as follows, to wit:

"United States of America,
District of Nevada,—ss.

I hereby certify and return that I received the within writ together with a certified copy of the creditors' complaint, and that I served the same on W. C. Stone, personally, as the President of the Exploration Mercantile Company, at Goldfield, in said District, on the 14th day of September, 1908. I further certify and return that I served W. C. Stone personally, as the President of the Exploration Mercantile Company, with an order to Show Cause, a temporary restraining order and an injunction to stay suit, at Goldfield, in said district on the 14th day of September, 1908. I also certify and return that I served C. E. Wylie, personally, as the Receiver in charge of the Exploration Mercantile Company, with an injunction to stay suit and a temporary restraining order, at Goldfield, in said District, on the 14th day of September, 1908.

ROBERT GRIMMON,
U. S. Marshal.
By H. R. Mack, Deputy.

MARSHAL'S EXPENSES AND FEES.

7 services.....$ 28.00

Mileage on two writs, 345 miles each, at 12¢.....$ 82.80

$110.80"

That on said 14th day of September, 1908, service of said orders was admitted in writing, a copy of which writing is as follows, to wit:

"Service of the within subpoena, petition in bankruptcy, order to show cause, temporary restraining order, and the injunction to stay suit, this 14th day of September, 1908.

EXPLORATION MERCANTILE CO.

By W. C. STONE,

C. E. WYLIE, Receiver."

That on the 17th day of September, A. D. 1908, Thompson, Morehouse & Thompson filed their appearance as attorneys for the Exploration Mercantile Company, W. C. Stone and C. E. Wylie, receiver; that on the next day, at the time specified in said order and injunction, the said petitioning creditors [53] being represented in court by their counsel, a motion was made by said Thompson, Morehouse & Thompson, as such attorneys, to dissolve both of said restraining orders; that said motion was duly argued by the respective parties and submitted; and that said motion has never been decided; that said two orders have been at all times since their issuance, and now are, in full force and effect, and have not been modified; that on the 9th day of July, 1909, the Exploration Mercantile Company was duly ad-

judged a bankrupt on the ground that being then insolvent it did on the 6th day of August, 1908, apply for a receiver for its property; that at all times mentioned in said affidavit of P. F. Carney said C. E. Wylie was the vice-president of said Exploration Mercantile Company, and the receiver thereof appointed by said State Court; and that said C. E. Wylie knowingly, willfully and contemptuously violated said order and injunction against taking any further steps in the suit in said State Court in this, that he did, after the service of said orders upon him, knowingly, wilfully and contemptuously apply to said State Court on the 10th day of February, 1909, for an order permitting him as such receiver to sell the property of said Exploration Mercantile Company.

That said C. E. Wylie has also knowingly, wilfully and contemptuously violated said order restraining him from disposing of the property of the Exploration Mercantile Company, in this, that he did, after the service of the said orders upon him at divers times between the 30th day of September, 1908, and the 30th day of April, 1909, knowingly, wilfully and contemptuously pay out sums of money, the property of said Exploration Mercantile Company, aggregating $5,700.00, to wit, $3,000.00 to W. C. Stone, $1,000.00 to I. S. Thompson and H. V. Morehouse, $700.00 to Frank G. Hobbs, and $1,000.00 to himself; that Frank G. Hobbs at all times mentioned in said affidavit of P. F. Carney was the Secretary of said Exploration Mercantile Company, and that said Frank G. Hobbs has knowingly, wilfully and con-

temptuously violated said order restraining said C. E. Wylie from disposing of the property of said Exploration Mercantile Company, in this, that he did, after having actual notice and knowledge of said orders and the contents thereof, knowingly, wilfully and contemptuously counsel, advise, induce, aid and [54] abet said C. E. Wylie to violate said order, and did, after such knowledge and notice, knowingly, willfully and contemptuously receive from said C. E. Wylie, between the 1st day of October, 1908, and the 30th day of April, 1909, sums of money aggregating $700.00, the property of said Exploration Mercantile Company, and did retain said sums to his own use.

That Walter C. Stone, also known as W. C. Stone, at all times mentioned in said affidavit of P. F. Carney, was the President of said Exploration Mercantile Company, and that said Walter C. Stone has knowingly, wilfully and contemptuously violated said order restraining said C. E. Wylie from disposing of the property of said Exploration Mercantile Company, in this, that he did, after having actual notice and knowledge of said orders and the contents thereof, knowingly, wilfully and contemptuously counsel, advise, induce, aid and abet said C. E. Wylie to violate said order, and did, after such knowledge and notice, knowingly, wilfully and contemptuously receive from said C. E. Wylie, between the 1st day of October, 1908 and the 1st day of February, 1909, sums of money aggregating $3,000.00, the property of said Exploration Mercantile Company, and did retain said sums to his own use;

that said I. S. Thompson at all times mentioned in said affidavit of P. F. Carney was an attorney at law and a member of the law firm of Thompson, Morehouse & Thompson, and that said law firm was, at all said times, the attorneys for said Exploration Mercantile Company, said W. C. Stone and said C. E. Wylie, receiver; and that said I. S. Thompson has knowingly, wilfully and contemptuously violated said order and injunction against taking further steps in said suit in said State Court, in this, that he did as such attorney knowingly, wilfully and contemptuously counsel, advise, induce, aid and abet said C. E. Wylie to violate said last-named order and injunction and to apply to said State Court on the 10th day of February, 1909, for an order permitting said C. E. Wylie as such receiver to sell the property of said Exploration Mercantile Company.

That said I. S. Thompson did also knowingly, wilfully and contemptuously violate said order restraining said C. E. Wylie from disposing of the property of said Exploration Mercantile Comany in this, that he did, after having actual notice and knowledge of said orders and the contents thereof, knowingly, wilfully and contemptuously counsel, advise, induce, aid and abet said C. E. Wylie to violate said restraining order, and did, after such knowledge and notice, knowingly, wilfully and contemptuously receive from said C. E. Wylie, on the 7th day of December, 1908, the sum of $1,000.00, the property of said Exploration Mercantile Company, and did retain said sum to the use of said law firm.

That said H. V. Morehouse at all times mentioned

in said affidavit of P. F. Carney was an attorney at law and a member of the law firm of Thompson, Morehouse & Thompson, and that said law firm was, at all said times, the attorneys for said Exploration Mercantile Company, said W. C. Stone and said C. E. Wylie, receiver; and that said H. V. Morehouse has knowingly, wilfully and contemptuously violated said order and injunction against taking further steps in said suit in said State Court, in this, that he did [55] as such attorney knowingly, wilfully and contemptuously counsel, advise, induce, aid and abet said C. E. Wylie to violate said last-named order and injunction and to apply to said State Court on the 10th day of February, 1909, for an order permitting said C. E. Wylie as such receiver to sell the property of said Exploration Mercantile Company.

That said H. V. Morehouse did also knowingly, wilfully and contemptuously violate said order restraining said C. E. Wylie from disposing of the property of said Exploration Mercantile Company, in this, that he did, after having actual notice and knowledge of said orders and the contents thereof, knowingly, wilfully and contemptuously counsel, advise, induce, aid and abet said C. E. Wylie to violate said restraining order; and did, after such knowledge and notice, knowingly, wilfully and contemptuously receive from said C. E. Wylie, on the 7th day of December, 1908, in conjunction with said I. S. Thompson, the sum of $1,000.00, the property of said Exploration Mercantile Company, and did retain said sum to the use of said law firm. And as conclusions of law from the foregoing facts it ap-

pears to the court, and it so finds: That said C. E. Wylie, I. S. Thompson and H. V. Morehouse are, and each of them is, guilty of contempt of this court, in that they, and each of them, knowingly, wilfully and contemptuously disobeyed said order and injunction against taking further steps in said suit in the State Court, they, and each of them, having the power to obey said order.

That said C. E. Wylie, Frank G. Hobbs, Walter C. Stone, sometimes known as W. C. Stone, I. S. Thompson and H. V. Morehouse are, and each of them is, guilty of contempt of this court, in that they, and each of them, knowingly, wilfully and contemptuously disobeyed said order restraining said Exploration Mercantile Company and said C. E. Wylie, receiver, from disposing of the property of said Exploration Mercantile Company, they, and each of them, having the power to obey said order.

It is therefore ordered, adjudged and decreed that said C. E. Wylie is guilty of contempt of this court, in that he violated said order and injunction against taking any further steps in said suit in the State Court, and it is hereby further ordered; that said C. E. Wylie pay to the Clerk of this Court a fine of one dollar ($1.00) for the use of the Government [56] of the United States; that said payment be made within ten days after service upon him of a certified copy of this order, and that, unless such payment be so made by said C. E. Wylie, he stand committed to the county jail of the County of Ormsby, State of Nevada, until the payment of said fine, or until the further order of this Court.

It is further ordered, adjudged and decreed that said C. E. Wylie is guilty of contempt of this Court, in that he violated said order restraining him from disposing of any of the property of said Exploration Mercantile Company, and it is hereby further ordered that said C. E. Wylie pay to the Clerk of this Court a fine of One Thousand Dollars ($1,000.00) for the benefit of the estate of said Exploration Mercantile Company, a bankrupt; that said payment be made within ten days after service upon him of a certified copy of this order, and that, unless such payment be so made by said C. E. Wylie, he stand committed to the county jail of the County of Ormsby, State of Nevada, until the payment of said fine, or until the further order of this Court.

It is further ordered, adjudged and decreed that said Frank G. Hobbs is guilty of contempt of this court, in that he violated said order restraining said C. E. Wylie from disposing of the property of said Exploration Mercantile Company, and it is hereby further ordered that said Frank G. Hobbs pay to the Clerk of this Court a fine of Two Hundred Dollars ($200.00) for the use of the Government of the United States; that said payment be made within ten days after service upon him of a certified copy of this order, and that, unless such payment be so made by said Frank G. Hobbs, he stand committed to the county jail of the County of Ormsby, State of Nevada, until the payment of said fine, or until the further order of this Court.

It is further ordered, adjudged and decreed that said Walter C. Stone, also known as W. C. Stone,

is guilty of contempt of this Court, in that he violated said order restraining said C. E. Wylie from disposing of the property of said Exploration Mercantile Company, and it is hereby further ordered that said Walter C. Stone, also known as W. C. Stone, pay to the Clerk of this Court a fine of Three *Thousand ($3,000.00)* for the benefit of the estate of said Exploration Mercantile Company, a bankrupt; that said [57] payment be made within ten days after service upon him of a certified copy of this order, and that, unless such payment be so made by said Walter C. Stone, he stand committed to the County Jail of the County of Ormsby, State of Nevada, until the payment of said fine, or until the further order of this Court.

It is further ordered, adjudged and decreed that said I. S. Thompson is guilty of contempt of this Court, in that he violated said order and injunction against taking further steps in said suit in the State Court, and it is hereby further ordered that said I. S. Thompson pay to the Clerk of this Court a fine of One Dollar ($1.00) for the use of the Government of the United States; that said payment be made within ten days after service upon him of a certified copy of this order, and that unless such payment be so made by said I. S. Thompson, he stand committed to the County Jail of the County of Ormsby, State of Nevada, until the payment of said fine, or until the further order of this Court.

It is further ordered, adjudged and decreed that said I. S. Thompson is guilty of contempt of this Court, in that he violated said order restraining said

C. E. Wylie from disposing of any of the property of said Exploration Mercantile Company, and it is hereby further ordered that said I. S. Thompson pay to the Clerk of this Court a fine of Five Hundred Dollars ($500.00); that thereupon said Clerk pay to the creditors prosecuting these contempt proceedings said sum as partial compensation for their expenses, costs and attorneys' fees herein; that said payment be made by said I. S. Thompson within ten days after service upon him of a certified copy of this order, and that unless such payment be so made by said I. S. Thompson, he stand committed to the county jail of the County of Ormsby, State of Nevada, until the payment of said fine, or until the further order of this Court.

It is further ordered, adjudged and decreed that said H. V. Morehouse is guilty of contempt of this Court, in that he violated said order and injunction against taking further steps in said suit in the State Court, and it is hereby further ordered that said H. V. Morehouse pay to the Clerk of this Court a fine of One Dollar ($1.00) for the use of the Government of the United States. [58]

That said payment be made within ten days after service upon him of a certified copy of this order, and that, unless such payment be so made by said H. V. Morehouse, he stand committed to the County Jail of the County of Ormsby, State of Nevada, until the payment of said fine, or until the further order of this Court.

It is further ordered, adjudged and decreed that said H. V. Morehouse is guilty of contempt of this

court, in that he violated said order restraining said C. E. Wylie from disposing of any of the property of said Exploration Mercantile Company, and it is hereby further ordered:

That said H. V. Morehouse pay to the Clerk of this Court a fine of Five Hundred Dollars ($500.00); that thereupon said Clerk pay to the creditors prosecuting these contempt proceedings said sum as partial compensation for their expenses, costs and attorneys' fees herein; that said payment be made by said H. V. Morehouse within ten days after service upon him of a certified copy of this order, and that, unless such payment be so made by said H. V. Morehouse, he stand committed to the County Jail of the County of Ormsby, State of Nevada, until the payment of said fine, or until the further order of this Court. Done in open court this 12th day of April, A. D. 1912.

E. S. FARRINGTON,
Judge.

[Indorsed]: No. 103. In the District Court of the United States, in and for the District of Nevada. In the Matter of Exploration Mercantile Company, a Corporation, Bankrupt. And the Application of P. F. Carney in said Proceeding by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court, of Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc. Order Adjudging Guilty of Contempt. Filed April 12, 1912, at 10 min. past 10 o'clock A. M. T. J. Edwards, Clerk. J. L. Ken-

nedy, Attorney at Law, 325 Grant St., Eureka, Calif. [59]

[Opinion on Merits.]

In the District Court of the United States, in and for the District of Nevada.

No. 103.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, an Alleged Bankrupt.

DETCH & CARNEY, J. L. KENNEDY, ROBERT, RICHARDS & FOWLER, for Petitioning Creditors.

THOMPSON, MOREHOUSE & THOMPSON, for Defendant.

FARRINGTON, District Judge.

A jury having found that the Exploration Mercantile Company committed an act of bankruptcy by applying for a receiver while it was insolvent, a motion is now made in arrest of adjudication because of the alleged insufficiency of the creditors' petition.

It is averred in the amended petition that "at the date of filing the original petition herein, to wit, September 12th, 1908, for more than four months continuously next prior thereto and ever since said time, the aggregate of said Exploration Mercantile Company's property, at a fair valuation, amounted to less than the sum of Sixty Thousand Dollars, and that at all the said times its debts were in excess of Seventy-four Thousand Dollars."

This is a sufficient allegation that the Exploration Mercantile Company was insolvent August 6th, 1908, when an application was made to the State Court for appointment of a receiver for the property of the company.

It is next alleged that the entire capital stock of the company consists of 50,000 shares of the par value of one dollar each, of which W. C. Stone owns 48,000 shares, F. G. Hobbs 1,000 shares and C. E. Wylie 1,000 shares; that these three persons not only owned all the capital stock, but they constituted the entire board of directors of said corporation, Stone being its president, Wylie its vice-president, and Hobbs its secretary and treasurer; that these three persons conspired and agreed to evade the provisions of the bankrupt act, and to prevent creditors from obtaining a knowledge of the company's affairs, and from participating in the choice of a trustee; to hinder, delay and defraud the creditors of the company, and to force [60] them to accept less than the full amount of their claims; "that in pursuance of said conspiracy and agreement said directors and officers, acting for and on behalf, and as the act and deed, of said corporation, which was then and there insolvent as aforesaid, on the 6th day of August, A. D. 1908, caused to be filed in the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda, an application praying for the appointment of a receiver with a view to the dissolution of said corporation." The petition so caused to to be filed was presented by the said W. C. Stone.

It was averred therein that the assets of the company amounted to $95,000, while its liabilities were but $65,000; that owing to depressed conditions in business and the difficulty of making collections, the assets of the company were in danger of being wasted through attachment or litigation; that the plaintiff Stone is the holder of more than one-tenth of the capital stock of the corporation, and "that said corporation should be dissolved and that a receiver should be appointed to take charge of the business and affairs of said corporation, that its property may be preserved, its creditors paid, and its assets cared for." The prayer, in substance, was that a receiver be appointed to manage the affairs of the company with a view to its dissolution. The creditors' petition also alleged that on the same day, August 6th, 1908, the above-mentioned petition was filed, summons was issued, on which said Wylie, in pursuance of said conspiracy, and as the act of said corporation, endorsed an admission of service; that on the same day the said directors and officers, as the act of said corporation, caused to be filed in said court and cause an appearance and application for the appointment of a receiver of the property of said company. Said appearance reads in part as follows: "W. C. Stone, Plaintiff, vs. Exploration Mercantile Company, a Corporation, Defendant. Now comes C. E. Wylie, manager and one of the directors of the above-named defendant, and enters the appearance of the said defendant in the above-entitled cause, and asks the above-entitled Court to appoint as receiver of said defendant C. E. Wyle, the under-

signed, one of the directors of said corporation. C. E. Wylie, Manager and Director of the Exploration Mercantile Company."

It is further alleged in the creditors' petition that on the same day [61] "the directors and officers of said Exploration Mercantile Company, a corporation, acting for and on behalf, and as the act and deed of said corporation, which was then and there insolvent as aforesaid, moved the said State Court upon the said pleadings as above set forth, for an order, and said State Court, on said day made its order appointing said C. E. Wylie receiver," etc. On the following day said Wylie entered upon the duties of his office as such receiver. That on September 8th, 1908, and at other times, said Stone, in pursuance of said conspiracy, and as the act of said corporation, sought to settle claims against it for sixty cents on the dollar; that ever since August 6th, 1908, said directors and officers have refused, and still refuse, petitioners access to the books of the company, and at all times have refused to permit petitioners' representatives to take or assist in taking an inventory of the property of the corporation. Near the end of the creditors' petition is this statement: "Ever since said 6th day of August, A. D. 1908, said Exploration Mercantile Company, a corporation, and each and all of said directors and officers have acquiesced in, upheld, ratified and confirmed the said proceedings and application for, and appointment of, said receiver, as aforesaid; and said Frank G. Hobbs has ratified and confirmed the same and has since been continuously in the employ of said receiver." The

petition concludes with a prayer that the Exploration Mercantile Company be adjudged bankrupt."

This petition having been filed, within due time thereafter the alleged bankrupt filed its answer, demanding a trial by jury. By consent of both parties the following issues in the form here set out were submitted to the jury:

"Whether on the 6th day of August, 1908, the date of the appointment of C. E. Wylie, as receiver of the Exploration Mercantile Company, by the District Court of the First Judicial District of the State of Nevada in the case of W. C. Stone vs. Exploration Mercantile Company, the aggregate of the property of the said Exploration Mercantile Company was, at a fair valuation, sufficient in amount to pay its debts."

"Whether on the 12th day of September, 1908, the date of the filing of the petition in bankruptcy in these proceedings, the aggregate of the [62] property of said Exploration Mercantile Company was, at a fair valuation, sufficient in amount to pay its debts."

"Whether, on the 6th day of August, A. D. 1908, the Exploration Mercantile Company, being insolvent, applied for a receiver for its property." The jury, after having heard the evidence and listened to the instructions of the Court, returned a negative answer to the first and second interrogatories, and an affirmative answer to the third.

Among the grounds urged in arrest of judgment and of the order of adjudication, there is no intimation that the verdict is not sustained by the evi-

dence. The several grounds may be resolved into one comprehensive objection; the creditors' petition fails to show that defendant was guilty of an act of bankruptcy in this, that it fails to show that defendant applied for a receiver for its property. It is contended that the petition not only fails to show that the corporation applied for a receiver, but under the Nevada statute it was and is impossible for any Nevada corporation to make such an application. Section 7 of the General Incorporation Law of Nevada (Stats. 1903, p. 121) provides that every corporation created under the provisions of this act shall have power "To wind up and dissolve itself, or to be wound up and dissolved in the manner hereinafter mentioned."

The power granted is the power "to wind up and dissolve itself or to be wound up and dissolved in the manner hereinafter mentioned." It is the winding up and dissolution of the corporation which is provided for. There is no attempt to circumscribe or limit the power to ask the appointment of a receiver. Receivers are frequently asked and appointed for corporation when there is no thought of dissolution. Section 89 of the act provides a method of dissolution by voluntary action of the stockholders, officers and creditors. Section 94, under which the proceedings in this case were had, provides for winding up a corporation by the Court, and reads as follows:

Receiverships and Dissolution by the Court.

Sec. 94. Whenever a corporation has in ten successive years failed to pay dividends amounting in all to five per cent of its entire outstanding

capital, or has willfully violated its charter, or its trustees or directors have been guilty of fraud or collusion of gross mismanagement in the conduct or control of its affairs, or its assets are in danger of waste through attachment, [63] litigation, or otherwise, or said corporation has abandoned its business and has not proceeded diligently to wind up its affairs, or to distribute its assets in a reasonable time, or has become insolvent and is not about to resume its business with safety to the public, any holder or holders of one-tenth of the capital stock may apply to the District Court, held in the district where the corporation has its principal place of business, for an order dissolving the corporation and appointing a receiver to wind up its affairs, and may by injunction restrain the corporation from exercising any of its powers or doing any business whatsoever, except by and through a receiver appointed by the Court. Such Court may, if good cause exist therefor, appoint one or more receivers for such purpose, but in all cases directors or trustees who have been guilty of no negligence nor active breach of duty shall have the right to be preferred in making such appointment, and such Court may at any time, for sufficient cause, make a decree dissolving said corporation and terminating its existence.

Subsequent sections provide for notice to creditors, presentation of claims to the receiver within a limited time, the barring of claims not so presented, the sale of property and the distribution of assets.

Although the act does not provide for the discharge of the debtor, and is not so entitled, it is essentially an insolvency act. The winding up of the corporation discharges its debts.

"An insolvent law is a law for the relief of creditors by an equal distribution among them of the assets of the debtor, but does not necessarily involve the discharge of the debtor."

Harbough, Assignee, vs. Costello, 184 Ill. 110;
In re Merchants' Ins. Co., 17 Fed. Cas. No. 9441;
Moody vs. Development Co., 102 Me. 365;
Salmon vs. Salmon, 143 Fed. 395.

"In so far as the person and the subject matter falls within the jurisdiction of the bankrupt act and is within the jurisdiction of the bankrupt court, the State insolvency law is superseded and cannot be invoked."

Littlefield vs. Gay, 96 Me. 423;
Westcott & Co. vs. Barry, 69 N. H. 505;
In re Curtis, 91 Fed. 737.

In the absence of statutory authority courts of equity have no power to wind up the affairs of a corporation.

Beach on Receivers, sec. 86.

But when from any cause the property of a corporation is in imminent danger of waste or destruction and a receivership is necessary and there is no other adequate relief, a court of equity has inherent power to appoint a receiver to take charge of the corporate assets and affairs; but this power is to preserve and not to dissolve a corporation, and as soon as the necessity for such supervision ceases,

the court must lift its hands and retire.

Beach on Receivers, sec. 421.

The doctrine that a receiver cannot be appointed for corporate property on application of the corporation itself applies quite as strongly to [64] persons as to corporations.

17 Ency. Pl. & Pr., p. 687.

If the rule not only forbids the appointment, but also renders it impossible for a debtor to apply for the appointment of a receiver over his own property, why did Congress declare it an act of bankruptcy for a person being insolvent to apply for a receiver? It is unreasonable to suppose that Congress would proscribe an act which no one can commit. There is a difference between asking and receiving; between the application for and the granting of a receivership. A corporation through its officers may apply for relief which a court may properly and justly refuse, or which it has no power to grant. When a person who is actually insolvent applies for a receiver for his property, the act of bankruptcy is committed, and this is so irrespective of any action which may be had in the court to which the application is made. The application is in itself an admission that the debtor's affairs require supervision.

The fact that certain powers are conferred by statute upon corporations does not mean that a corporation is unable to perform any act beyond the scope of such enumerated powers. The statute restricts the authority of the corporation and fixes the limits beyond which its acts are unlawful and

in excess of the powers conferred. If it were otherwise a corporation could not be guilty of an *ultra vires* act, a tort, or a misdemeanor. Corporations commit wrongful, unlawful and even criminal acts, and they are held responsible therefor, even though the act is not the formal act of the corporation.

United States vs. McAndrews & Forbes Co., 149 Fed. 823, 835;

Clark on Corp., sec. 63.

"There may be actual corporate conduct," says the Court in People vs. North River Sugar-Refining Co., 121 N. Y. 582, 619, "which is not formal corporate action; and where that conduct is directed or produced by the whole body, both of officers and stockholders, by every living instrumentality which can possess and wield the corporate franchise, that conduct is of a corporate character, and, if illegal and injurious, may deserve and receive the penalty of dissolution."

A corporation is an association of natural persons united as one body [65] and endowed by law with the capacity to act in many respects as an individual, as a separate and distinct entity, but a corporation can only act or think or purpose through its officers, directors or stockholders. It is inconceivable that a corporation should form or carry into effect any design which is contrary to the wishes of its directors, officers and stockholders; it exists to carry out their purposes and their plans. The conception that a corporation is a legal entity existing separate, apart and distinct from the natural persons who compose it is a fiction which has been introduced

for convenience in making contracts, acquiring property, suing and being sued, and to secure limited liability on the part of stockholders.

"It is a certain rule," says Lord Mansfield, Chief Justice, "that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted."

Johnson vs. Smith, 2 Burr. 962;

Wood vs. Ferguson, 7 Ohio St. 29;

Clark on Corp., p. 9.

The fiction of a corporate entity was never invented to promote injustice or fraud, and when it is used for such a purpose it should be disregarded, and the actual fact should be ascertained.

In re Rieger, Kapner & Altman, 157 Fed. 609, 613;

Bank vs. Trebien, 59 Ohio St. 316;

State vs. Standard Oil Co., 15 L. R. A. 145, 153, 34 L. R. A. 541;

People vs. N. R. S. R. Co., 121 N. Y. 582, 613;

United States vs. Milwaukee etc. Co., 142 Fed. 247, 252;

Holbrook, Cabot & Rollins Corp. vs. Perkins, 147 Fed. 166, 169;

Cawthra vs. Stewart, 109 N. Y. S. 770;

U. S. & Mexican Trust Co. vs. Delaware etc. Co., 112 S. W. 447, 460;

Southern E. S. Co. vs. State, 44 So. Rep. 785, 790; 7 Am. & Eng. Ency. L. 633, 634;

1 Cook on Corp. (5 ed.), p. 27.

"For certain purposes the law will recognize the

corporation as an entity distinct from the individual stockholders; but that fiction is only resorted to for the purpose of working out the lawful objects of the corporation. It is never resorted to when it would work an injury to any one, or allow the corporation to perpetrate a fraud upon anybody."

The Sportsman Shot Co. vs. American S. & L. Co., 30 Wkly. Law Bul. 87.

In United States vs. Milwaukee Refrigerator Transit Co. et al., 142 Fed. 247, 255, it was charged that the Transit Company was a dummy corporation organized, owned and operated by the stockholders of the Brewing Company as a device to cover the receipt of rebates on interstate shipments of beer. After an exhaustive examination of the authorities, the Court [66] stated the principle thus:

"If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons."

In Re Reiger et al., 157 Fed. 609, a proceeding in bankruptcy, the bankrupts were copartners; in the course of their business they had bought 99 per cent of the outstanding stock of a corporation, the remaining shares being held by relatives of one of the copartners. Receivers having been appointed for the partnership assets, an application was made to

extend the receivership to the property of the corporation. It was charged that the bankrupts having abandoned the partnership business, were still in control of the business and property of the corporation, and if permitted to remain in control they would remove and dispose of it. The Court held that all the property of the corporation belonged to the copartners, and entirely ignored the fact that the property belonged to a corporation. The Court said:

> "The fiction of legal corporate entity cannot be so applied by the partners as to work a fraud on a part of their creditors, or hinder and delay them in the collection of their claims, and thus defeat the provisions of the bankruptcy act. The doctrine of corporate entity is not so sacred that a court of equity, looking through forms to the substance of things, may not in a proper case ignore it to preserve the rights of innocent parties or to circumvent fraud."

In Bank vs. Trebein Co., 59 Ohio St. 316, 326, a failing debtor formed a corporation composed of himself and certain members of his family, to which he transferred all his property in exchange for stock of which he received substantially all. He immediately placed all his stock, except one share, with certain of his creditors as security for their claims, and then as president and general manager of the corporation, retained the control and management of the property and business which he had before the corporation was formed. The Court declared the corporation, in substance another Trebein, saying:

"The fiction by which an ideal legal entity is attributed to a duly formed incorporated company, existing separate and apart from the individuals composing it, is of such general utility and application, as frequently to induce the belief that it must be universal, and be, in all cases adhered to, although the greatest frauds may thereby be perpetrated under the fiction as a shield. But modern cases, sustained by the best text-writers, [67] confine the fiction to the purposes for which it was adopted—convenience in the transaction of business and in suing and being sued in its corporate name, and the continuance of its rights and liabilities, unaffected by changes in its corporate members; and have repudiated it in all cases where it has been insisted on as a protection to fraud or any other illegal transaction."

In Cawthra vs. Stewart, 109 N. Y. S. 770, Stewart owned 98 share of the capital stock of a corporation known as L. C. Stewart & Co., and controlled the other two shares. Cawthra, induced by false representations made by Stewart, who was then a director of the company and its president, invested $3,000 in the corporate business and received half the stock. Suit was brought against Stewart and the Company to rescind the stock contract and recover the amount paid. The corporation demurred that it was a distinct, definite entity, and not liable for any acts of Stewart which it had not authorized. The Court said:

"Strictly speaking, such terms as 'authority' and 'ratification' and others which imply separate

personalities are inappropriate. We do not have a case of agency, but of identity. It cannot properly be said that the corporation could clothe Stewart with authority any more than that Stewart could clothe himself with authority. He was the corporation and it was only another form of him. Whatever he did with respect to the matters he was handling under the guise of a corporation was the act of the corporation."

In the case of State vs. Standard Oil Co., 15 L.R.A., 145, it appears that the stockholders in various corporations and a number of copartnerships interested in the oil business agreed to transfer their interests in their several properties, and all their corporate stock, to certain trustees; they were to receive in lieu thereof trust certificates equal in par value to the stock which they surrendered. There was no act on the part of the corporation, no formal act, it was simply the act of the stockholders of these various corporations, and of course that meant all the officers and the directors. It was held that this action of the stockholders was, under the circumstances, to be regarded as the act of the corporation. The following extract is from the opinion:

"Applying, then, the principle that a corporation is simply an association of natural persons, united in one body under a special denomination, and vested by the policy of the law with the capacity of acting in several respects as an individual, and disregarding the mere fiction of a separate legal entity, since to regard it in an inquiry like the one before us would be subversive of the pur-

pose for which it was invented, is there, upon an analysis of the agreement, room for doubt that the act of all the stockholders, officers and directors of the company in signing it should be imputed to them as an act done in their capacity as a corporation? We think not, since thereby all the property and business of the company is, and was [68] intended to be, virtually transferred to the Standard Oil Trust, and is controlled through its trustees, as effectually as if a formal transfer had been made by the directors of the company. On a question of this kind, the fact must constantly be kept in view that the metaphysical entity has no thought or will of its own; that every act ascribed to it emanates from and is the act of the individuals personated by it; and that it can no more do an act, or refrain from doing it, contrary to the will of these natural persons, than a house could be said to act independently of the will of its owner, and, where an act is ascribed to it, it must be understood to be the act of the persons associated as a corporation, and, whether done in their capacity as corporators or as individuals must be determined by the nature and tendency of the act. It therefore follows, as we think, from the discussion we have given the subject, that where all, or a majority, of the stockholders comprising a corporation to do an act which is designed to affect the property and business of the company, and which, through the control their numbers give them over the selection and conduct of the corporate agencies, does affect the property

and business of the company, in the same manner as if it had been a formal resolution of its board of directors, and the act so done is *ultra vires* of the corporation and against public policy, and was done by them in their individual capacity for the purpose of concealing their real purpose and object, the act should be regarded as the act of the corporation; and, to prevent the abuse of corporate power, may be challenged as such by the State in a proceeding in *quo warranto.*"

While the motion now under consideration rests upon the alleged insufficiency of the creditors' petition, it may not be amiss to consider how completely certain allegations of the petition are supported and illustrated by the evidence.

The creditors were refused access to the books. Even after proceedings in the State Court were commenced the books were withheld and the creditors informed if they wished to see the accounts they must procure an order from that court. Mr. Ruhl was directed by the State Court to expert the books, but even he, armed with this authority, was not permitted to examine all of them; the accounts of Mr. Stone were withheld, and but a semblance of full exhibition was had. An order to produce books and papers was required in this court in addition to the subpoena *duces tecum.* A number of leaves were torn from the journal by Mr. Stone, and either lost or destroyed. Mr. Stone gives as an excuse for such mutilation of the journal that the agent of Bradstreet insisted on seeing the books. In the merchandise account only those purchases of mer-

chandise were recorded for which cash payments had been made. Credit purchases of merchandise were not shown by that account, and could be ascertained only by examination of the various statements which accompanied each purchase. Obviously books kept in such a manner do not show liabilities; they conceal the real conditions. [69]

An auto account, an account with Mr. Pryor, and a very active stock and commission account show frequent and considerable investments of Exploration Mercantile Company money. These, the bookkeeper Mr. Hobbs, stated were really accounts of Mr. Stone. The transfers into Mr. Stone's personal account were shown, if at all, on the destroyed journal leaves. The detached ledger leaves showing Mr. Stone's personal account were withheld from examination until an order for production of books and papers were made in this Court during the progress of the trial. An entry made December 31st, 1907, credits Mr. Stone with wages, $36,000, and rent $12,000; total $48,000. In reference to these matters Mr. Hobbs testifies as follows:

"(By Mr. CARNEY.)

Q. I will ask you to examine Petitioners' Exhibit No. 9, being the journal, on page 31, under the head of 'Profit and Loss,' and 'Rent,' what was the amount of rent for that store building during the year 1906? A. $3,600.

Q. That is at the rate of $300 per month?

A. Yes, sir.

Q. That entry was made by yourself?

A. It was.

Q. As the treasurer of the corporation?

A. Yes, sir.

Q. I will ask you to examine this sheet known as 'Account Walter C. Stone,' on December 31, 1907 (Hands to witness), for $12,000; when was that $12,000 placed thereon, the figures?

A. When was it placed there?

Q. Yes. A. On December 31st, 1907.

Q. 1907? A. Yes.

Q. I will ask you to examine an item known as 'Sundries' on December 31st, 1907, being an amount of $55,801.50. A. Yes, sir.

Q. What does that include?

A. I could not tell unless I had the journal page for that, Journal 50, or I could get it from the ledger with time, it will take a little time to figure those things.

Q. This is the journal, is it not? (Hands book to witness.) A. Yes, sir, that page is missing.

Q. That has reference to the page that is missing, has it? A. Yes, sir.

Q. And those pages that are missing included these items of accounts? A. The journal entries.

Q. Have you any idea what that fifty-five thousand odd dollars is for?

A. I have an idea, but I could not give it to you unless I could look over the ledger records, I could get it from that.

Q. I will ask you to look at [70] the item of December 31st, 'Wages to date, $36,000.'

A. Yes, sir.

Q. When was that entry made?

A. December 31st, 1907.

Q. $36,000? A. Yes, sir.

Q. I wish you would examine that paper and see if that was not $12,000?

A. It has been changed, or the journal record was changed at that particular time, at that same time.

Q. It had been changed at that time?

A. Yes, it was changed at that time.

Q. There has been considerable diligence on your part, on Mr. Stone's part and on Mr. Wylie's part since the filing of this petition in bankruptcy to show by the books that this institution was solvent on the 6th day of August 1908, has there not?

A. Yes, sir.

Q. I will ask you to look at the footings of $87,-439.89, and ask you whether or not those footings have not been changed?

A. The book records were changed at that particular time.

Q. They were changed from $12,000 to $36,000?

A. I don't know what the changes were; I would not state what the change was, but I remember of making that change myself; I made it.

The COURT.—When did you say that change was made?

A. At the time of entry.

Q. (Mr. CARNEY.) When was the entry made?

A. December 31st, 1907.

Q. Do you know what wages Mr. Stone received?

A. The wages, no, unless I could figure it up.

Q. What was his salary as the president of the corporation?

A. I could not tell you unless I figured it up from the ledger.

Q. Have you no recollection as to what Mr. Stone drew as an officer of that corporation for a salary?

A. It went in as a lump sum, I believe, at that particular time.

Q. As a matter of fact, Mr. Stone never received more than $300 per month, did he during 1906, as wages? A. I don't remember, I could not tell.

Q. Did you ever have any meeting as to what wages Mr. Stone should receive as an officer of this corporation? A. Yes, sir.

Q. When was that meeting?

A. At the time this entry was made, I think, some time around there.

Q. Are there any records of it in the minute-book of the Exploration Mercantile Company?

A. I think so.

Q. Will you kindly produce them? [71]

A. I am not absolutely certain, I think there was.

Q. I hand you the minute-book of the corporation (hands to witness), do you find any memorandum there?

A. It says, 'Meeting of the Board of Directors of the Exploration Mercantile Company. This meeting of the Board of Directors held on the 2d day of January, 1908, in the office of the company, present, W. C. Stone, Frank G. Hobbs, C. E. Wylie. At this meeting the Board examined the books of the corporation kept by its secretary, Frank G. Hobbs, and the balance struck by him, and on motion it was resolved that the said accounts are correct,

and the balances are true, and that the same be and hereby are adopted and affirmed.'

Q. Those are minutes placed there by typewriting?

A. Yes, sir, these are typewritten minutes.

Q. Where were they prepared?

A. I don't know.''

The reasons why Messrs. Stone, Wylie and Hobbs objected to an examination of the books are obvious. There is some testimony to the effect that Mr. Hobbs and Mr. Wylie objected to the petition presented by Mr. Stone in the State Court, but in the light of their conduct I am satisfied their objections were not serious. The refusal to permit examination of the books, and the adoption and use of a method of book-keeping which tended to conceal the real condition of the business, were calculated to hinder and delay creditors. In this Messrs. Stone, Wylie and Hobbs participated. The conduct of each of them indicates that he knew there was something to be concealed from the creditors, and also that he knew the concern was insolvent. They seem to have agreed upon Mr. Stone's salary after the services had been rendered. The term of service could not have exceeded two years, for which they fixed a salary of $18,000 per year. During a portion of these two years Mr. Stone was travelling in Europe and China.

Is it reasonable to suppose that a concern having a total capital stock of $50,000, paying its president a salary of $18,000 per year and a rent of $12,000 per year can be operated at a profit? The evidence is very conclusive that each of the three men knew the business was running behind, and wished to con-

ceal that fact. When the creditors were about to commence attachment suits, Mr. Stone, who had received the $48,000 credit, who had [72] mutilated the journal, who had withheld his own account from examination, who was then the actual owner of 96 per cent of the stock of the concern, filed in the State Court a petition asking that Court to wind up the corporation, and place its property in the hands of a receiver because litigation was threatened and the assets were likely to be wasted. Mr. Wylie, general manager of the corporation, immediately appeared in court and filed an admission of service for the corporation, and a request that he himself be appointed receiver. This proceeding in the State Court was certainly in harmony with the previous and subsequent conduct of the three men; it was but a part of a scheme to hinder and delay and therefore to defraud the creditors of the Exploration Mercantile Company, and the scheme was participated in, and consistently pushed and carried out by all the officers of the corporation, by its president, secretary and treasurer, general manager, and directors, and by all its stockholders.

It is alleged, and the testimony shows, that all the directors, officers and stockholders of the Exploration Mercantile Company, as the act and deed of the corporation, caused the Stone petition to be filed and a receiver to be asked for, and later that they, in behalf of said corporation, as its act and deed, moved the court for an order appointing Wylie receiver. It is also averred that the corporation ratified the act. It is also alleged, and amply proven

by the testimony, that this was all done to hinder, delay and defraud its creditors; and it is clear from the testimony that these persons, Stone, Wylie and Hobbs, knew the corporation was insolvent at the time the receiver was applied for. Under the shelter of a receivership, which tied the hands of the creditors, they proposed themselves to control its business and conceal its actual condition. Inasmuch as all the stockholders, all the officers and all the directors of this corporation, without exception, are using the distinction between themselves and the corporate entity for the purpose of hindering, delaying and defrauding creditors, that distinction should be disregarded, and the act of applying for a receiver should be imputed to the corporation itself. The motion in arrest of judgment is denied, and the usual adjudication of bankruptcy will be entered. [73]

[Indorsed]: No. 103. In the District Court of the United States, in and for the District of Nevada. In the Matter of Exploration Mercantile Company, a Corporation, an Alleged Bankrupt. Opinion. Filed July 9th, 1909. T. J. Edwards, Clerk. [74]

[Opinion on Contempt Proceedings]

In the District Court of the United States in and for the District of Nevada.

In the Matter of the EXPLORATION MERCANTILE COMPANY (a Corporation), Bankrupt, and the Application of P. F. Carney, in Said Proceeding by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court,

of Date July 9th, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson, and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc.

J. L. KENNEDY, DETCH & CARNEY, E. E. ROBERTS, for Petitioning Creditors.

GEORGE S. GREEN, H. V. MOREHOUSE, for Respondents.

FARRINGTON, District Judge.

August 6th, 1908, W. C. Stone, who was then president and a stockholder and director of the Exploration Mercantile Company, caused to be filed in the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda, an application praying for the appointment of a receiver to take charge of the affairs of said corporation, with a view to its dissolution, under the directions and orders of that Court. On the same day C. E. Wylie, who was then manager of said company, and one of its directors and stockholders, appeared in said court, and asked in behalf of the corporation that he be appointed such receiver. Thereupon an order was made declaring said corporation dissolved, and appointing Wylie receiver, with full power to take charge of its assets, and to control its business. Wylie qualified at once, and immediately took possession of the property, and began to carry on the business. At the time this application was made the Exploration Mercantile Company was, and ever since has been, insolvent. Five weeks later, on the 12th day of September, 1908,

a petition was filed in this court by certain creditors of the company, praying that it be adjudged a bankrupt. On the same day the same creditors [75] presented a verified petition, in which it was alleged that the Exploration Mercantile Company had a large stock of merchandise, which would be dissipated and lost, to their irreparable injury, unless said company and C. E. Wylie, receiver, were restrained from selling or otherwise disposing of it. Accordingly, an order was made by this Court in the following terms:

"And now, this 12th day of September, 1908, on motion of said attorneys, it appearing to the Court that there is danger of irreparable injury to the creditors of the said debtor, unless the act sought to be enjoined is at once restrained, it is ordered that the above motion be heard at a session of said court, to be held at the City of Carson, on the 18th day of September, A. D. 1908, at 10 A. M.; and it is further ordered that, until the decision of this court upon the said motion, the said parties against whom an injunction is prayed be restrained, and they are hereby commanded, under such penalties as are inflicted by the laws of the United States, to abstain from the sale of, or in any other manner whatever disposing of the property or estate or any part thereof of the above-named Exploration Mercantile Company, a corporation."

A third petition also was filed, on the 12th day of September, 1908, alleging (1) that a petition in bankruptcy had been filed; (2) that proceedings had been had in the state court resulting in the appointment of C. E. Wylie as receiver, who was then conducting

the business of said bankrupt; and (3) "that if the said suit is not stayed great injury will be done to your petitioners and the estate of the Exploration Mercantile Company, a corporation, to be administered in bankruptcy herein." The prayer was that the suit in the State court be stayed and that the company, W. C. Stone and C. E. Wylie, and their agents, servants and counselors, be restrained from further prosecuting said suit. This was followed by an injunction in the following words:

"United States of America,
District of Nevada,—ss.
The President of the United States of America, to W. C. Stone, C. E. Wylie and Exploration Mercantile Company, a Corporation, Greeting:

Whereas, a petition has been filed on the bankruptcy side of the District Court of the United States for the District of Nevada, praying for an injunction to restrain the prosecution of a certain suit pending in the District Court of the First Judicial District, in and for the County of Esmeralda, in which said W. C. Stone is plaintiff and Exploration Mercantile Company is defendant, and has obtained an allowance for an injunction, as prayed for in said petition from the District Court of the United States for the District of Nevada: Now, therefore, we, having regard to the matters in said petition contained, do hereby command and strictly enjoin you, the said W. C. Stone, C. E. Wylie and Exploration Mercantile Company, a corporation, or either of you, and each of your agents, servants, at

torneys or counselors from further prosecuting said suit in said court, and from taking any further step or proceeding in said action or suit now pending as aforesaid, which commands and injunctions you are respectively required to observe until our said District Court shall make further order in the premises. Hereof, fail not, under the penalty of the law thence issuing.

Witness, the Honorable E. S. FARRINGTON, District Judge of the United States for the District of Nevada, this 12th day [76] of September, A. D. 1908, and in the hundred and thirty-third of the Independence of the United States of America.

[Seal] T. J. EDWARDS,
Clerk of said Court."

September 17th, 1908, Thompson, Morehouse & Thompson filed their appearance at attorneys for the Exploration Mercantile Company, W. C. Stone and C. E. Wylie, receiver. The company filed a demurrer to the petition for adjudication, and W. C. Stone presented a plea to the jurisdiction. On the following day, a motion was made by the company to dissolve the injunction. The motion was supported by affidavit of Frank G. Hobbs, one of the directors of the company. This motion has never been decided. On the 9th day of July, 1909, the Exploration Mercantile Company was duly adjudged a bankrupt on the ground that being then insolvent, it did on the 6th day of August, 1908, apply for a receiver for its property. On the same day, on petition of the petitioning creditors, supported by affidavit of P. F. Carney, the court ordered W. C. Stone,

C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, to show cause why they should not be adjudged guilty of contempt for disobedience of the foregoing order and injunction. Respondents then took the matter to the Circuit Court of Appeals. Their petition to review the order citing them to show cause was dismissed, for, as that Court held "an order to show cause why petitioner should not be punished for contempt for violating an injunction of the court of bankruptcy in a collateral matter is not a 'proceeding in bankruptcy' subject to review on an original petition."

Morehouse vs. Pacific Hardware & Steel Co., 177 Fed. 337.

And the order of adjudication was affirmed.

Exploration Mercantile Co. vs. Pacific Hardware & Steel Co., 177 Fed. 825.

The affidavit of P. F. Carney, filed July 9th, 1909, charged that said orders and injunctions issued September 12th, 1908, had been violated, subsequent to service of said order, by various disposals of the moneys and property of the Exploration Mercantile Company as follows: 1. Between September 30th, 1908, and April 30th, 1909, C. E. Wylie, vice-president and receiver of said corporation, paid out more than $10,000; and 2. Appropriated to his own use more than $1,000. 3. The said Wylie as receiver, on the 10th day of February, 1909, applied to said State court for an order [77] permitting him to sell the property of said corporation. 4. W. C. Stone, president of said corporation, demanded and received $3,000 from said

C. E. Wylie between October 6th, 1908, and January 20th, 1909. 5. Frank G. Hobbs, secretary of said corporation, between October 1st, 1908, and April 30th, 1909, received more than $700. 6. I. S. Thompson, attorney for said Wylie, receiver, and for said W. C. Stone, after having notice of said order and injunction, advised Stone to demand and receive said $3,000, and counseled Wylie to pay the same. 7. I. S. Thompson on the 7th day of December, 1908, and after notice and knowledge of said orders, demanded and received $1,000 from said Wylie, as attorney's fee. 8. H. V. Morehouse, attorney for said Wylie, receiver, and for said W. C. Stone, after notice and knowledge of said orders, asked the State court to order the sale of the property of said company, and advised said Court to pay no attention to the action of the Federal court; and 10. In conjunction with said Thompson, demanded and received from said Wylie as receiver, said $1,000 as attorney's fee.

The said I. S. Thompson, H. V. Morehouse and C. E. Wylie, in their several affidavits, disclaim all willful or contemptuous disobedience, but admit disbursements and receipts of money in the amounts above set out. They aver that the sums paid to Stone were for the rental of the building in which the business was conducted, the occupancy of which was then reasonably worth $500 per month; that the owner, W. C. Stone, was demanding payment of the rent, or that the receiver move out; and threatened suit to enforce collection of rent and treble damages, as provided by the laws of the State of Nevada, if

his demands were not complied with. Inasmuch as the property was then in custody of the State court, and in the belief that the Federal court had no authority to adjust the rents, and that it was wise to do so, the attorneys, I. S. Thompson and H. V. Morehouse, advised, and the receiver Wylie paid, the rent, $3,000, to Stone. Testifying in the State court February 9th, 1909, Wylie said the rental on the 6th day of August, 1908, was $500 per month; that Stone notified him on the 14th day of September, 1908, that the rent would be advanced to $1,500 per month, and on January 8th, 1909, Stone notified him to vacate the premises; that there [78] was an order "telling me (the receiver) to pay the rent as it accrued, all back rents, and all rent due and payable now," but no special order. At that time no allowance had been made to him in any form. Between August 7th, 1908, and January 27th, 1909, his receipts were $26,445.32; his disbursements were $24,964.05. Of the latter amount $11,062.09 was for "merchandise purchased to carry on the business." There was also an order "to carry on the business in its regular channels." Mr. Wylie further testified that when the injunction and restraining order of the Federal court were served, the stores were closed, and have so remained.

The alleged rents paid to Stone during the receivership, as shown by the journal in evidence, were as follows:

Sept. 1.	Aug. 6 to Sept. 30.....	$ 894.52
Oct. 7.	Store Rent Acct.....	500.00
Nov. 6.	Nov. Rent on Acct.....	500.00

Dec. 7. Store Rent a/c Dec. Rent 1500.00
Jan. 19. Rent on a/c 500.00

Both Thompson and Morehouse testified that they believed it to be for the best interests of the estate to pay these sums, and that the same were authorized by law, and by order of the Court appointing said receiver. The order referred to, omitting the recitals, reads as follows:

"Now, by authority of an act of the Legislature of the State of Nevada, entitled 'An Act providing a general corporation law,' approved March 16th, 1908, it is ordered that the said corporation be and is, so far as these proceedings are concerned, hereby dissolved; and that C. E. Wylie be appointed a receiver in the above-entitled proceedings, with full power to take charge of the assets, control and business of the Exploration Mercantile Company (a corporation), transacting business at Goldfield, in the County of Esmeralda, State of Nevada, and to immediately list and report to the Court all the assets of said corporation, and its entire liabilities, and to do any and all things as ordered and directed by this Court, and that he execute a bond for the faithful performance of his duties as such receiver, in the sum of $50,000.00; that upon the approval and filing of such bond in the sum aforesaid, and taking the oath of office, as required by law, the aforesaid C. E. Wylie be, and he is hereby appointed receiver of the corporation defendant, to wit, the Exploration Mercantile Company, with full power to take charge of the business of said corporation and con-

duct the same and institute any and all suits for the collection of the assets of said company."

There is little or no dispute as to the facts in this case. The order and injunction have been disobeyed. It is claimed they were issued without authority, because, 1. The State court had perfect and complete jurisdiction, and through its receiver was in possession of the property of the corporation when the restraining order and injunction were issued; 2. By section 720 of the Revised Statutes of the United States, the Federal court [79] is prohibited from issuing injunctions to stay proceedings in the State court, "except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." 3. The proceeding in the State court was not an insolvent suit, nor a claim provable in bankruptcy; 4. If it were a provable claim, no proper steps were taken, and no bond was given, as required by section 69 of the bankruptcy act; 5. An injunction can issue only in a pending case. The respondents, H. V. Morehouse, I. S. Thompson, C. E. Wylie, Frank G. Hobbs and W. C. Stone, were not parties to that case. No one but the corporation was sued in the State court. 6. This Court had no jurisdiction over the receiver, the assets in his hands, or the rents and attorneys' fees.

The further reply is that respondents acted in good faith; that the restraining order was not continued in force after hearing of the rule to show cause, and respondent's appearance on that occasion dissolved the injunction, unless it was continued by further order.

The fact that an injunction has been erroneously or irregularly issued is no excuse for its violation. If the Court has the power to issue the injunction, an erroneous or improvident exercise of that power results, not in a void, but in a voidable injunction, which must be obeyed, until revoked or set aside.

High on Inj., sec. 1416; 7 Am. & Eng. Ency. L. 438; In re Eaton, 51 Fed. 804.

On the other hand, if an injunction is absolutely void, as where the Court is without jurisdiction to grant it, a violation thereof is not contempt. At the hearing of the rule, September 18th, 1908, it was shown by the record then before this Court, that the Exploration Mercantile Company is a Nevada corporation, having at least three directors and three stockholders. The only parties to the suit in the State court were W. C. Stone, president of the corporation, and the corporation itself. The suit was brought under section 94 of the corporation law of Nevada, which provides for the dissolution of the corporation, and the appointment of a receiver to wind up its affairs, on application of the holders of one-tenth of its capital stock. The section of the Nevada corporation law referred to [80] reads as follows:

"Sec. 94. Whenever a corporation has in ten successive years failed to pay dividends amounting in all to five per cent of its entire outstanding capital, or has wilfully violated its charter, or its trustees or directors have been guilty of fraud or collusion or gross mismanagement in the conduct or control of its affairs, or its assets are in danger

of waste through attachment, litigation, or otherwise, or said corporation has abandoned its business and has not proceeded diligently to wind up its affairs, or to distribute its assets in a reasonable time, or has become insolvent and is not about to resume its business with safety to the public, any holder or holders of one-tenth of the capital stock may apply to the District Court held in the district where the corporation has its principal place of business, for an order dissolving the corporation and appointing a receiver to wind up its affairs, and may by injunction restrain the corporation from exercising any of its powers or doing any business whatsoever, except by and through a receiver appointed by the court. Such court may, if good cause exist therefor, appoint one or more receivers for such purpose, but in all cases directors or trustees who have been guilty of no negligence nor active breach of duty shall have the right to be preferred in making such appointment, and such court may at any time for sufficient cause make a decree dissolving such corporation and terminating its existence."

Subsequent sections provide for notice to creditors, presentation of claims to the receiver within a limited time, barring of claims not so presented, sale of property, payment of the receiver's compensation and expenses, and distribution of the assets. Although the Act does not provide for discharge of the debtor, it is essentially an insolvent act. The dissolution of a corporation and the distribution of its assets, certainly operate as a discharge of its debts.

Exploration Mercantile Co. vs. Pacific Hardware & Steel Co., 177 Fed. 825, 828.

In considering the Nevada statute the Supreme Court in Hettel vs. District Court, 30 Nev. 382, held that an order appointing a receiver and dissolving a corporation, was void, where the Court had not acquired jurisdiction over the corporation, and over the natural persons interested in the subject matter of the orders at the time they were made. In a later case (Golden vs. District Court, 31 Nev. 250), the same court held that in such a proceeding the directors of the corporation are not only proper, but necessary parties, as if not joined the Court is without jurisdiction to dissolve the corporation or appoint a receiver.

In the present case it appears from the records and the certified copies of proceedings in the State court, which were before this court at the time the rule to show cause was heard, that the order dissolving the corporation and appointing a receiver, was void, because all the directors were [81] not joined as parties to that proceeding, and thus no jurisdiction had been obtained "over the natural persons interested in the subject matter of the orders at the time they were made."

It was shown by the petition for adjudication that the company was insolvent; that it had been doing business at a loss, and selling at greatly reduced prices, and that the receiver had been procuring new merchandise.

The petition filed in the State court contained this allegation:

"Owing to the depressed condition in business, and the inability of said defendant corporation at the present time to collect the amounts owing to it, the said corporation is in danger of its assets being wasted through attachment or litigation, as the aforesaid claims and other claims are due, and the said corporation is liable at any time to be attached and therefore be unable to carry on and continue its business or to be put to very large and useless expense by way of litigation, and the assets of the property be wasted thereby."

The obvious purpose and effect of the proceeding in the State court was to enable the bankrupt corporation to carry on its business, settle with its creditors, and wind up its affairs under the old management, and thus deprive creditors of their right to have the estate administered in a court of bankruptcy by a trustee of their own selection. In other words, it was clearly an attempt to evade the effect and operation of the bankruptcy act.

In re Watts, 190 U. S. 1, 27, a receiver had been appointed for an insolvent corporation by an Indiana State court, on a bill filed for the purpose of dissolving the company and winding up its business. Mr. Justice Fuller said:

"The operation of the bankruptcy laws of the United States cannot be defeated by an insolvent commercial corporation applying to be wound up under State statutes. The bankruptcy law is paramount, and the jurisdiction of the federal courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent per-

sons and corporation, is essentially exclusive. The general rule as between courts of concurrent jurisdiction is that property already in possession of the receiver of one court cannot rightfully be taken from him without the court's consent, by the receiver of another court appointed in a subsequent suit, but that rule can have only a qualified application where winding up proceedings are superseded by those in bankruptcy as to which the jurisdiction is not concurrent. Still it obtains as a rule of comity."

What were the rights of the parties and the status of the property when the petition in bankruptcy was filed? The order dissolving the corporation and appointing a receiver being void, Mr. Wylie was but a bailee for the Exploration Mercantile Company; his possession was not a case "of adverse possession, or the possession in enforcement of pre-existing liens"; [82] he, Stone, and Hobbs were still officers of the corporation. Mr. Morehouse and Mr. Thompson were their attorneys. Each of these respondents had actual notice on or about September 18th, 1908, and in Mr. Kennedy's affidavit it is clearly shown that Mr. Stone knew the company was insolvent, consequently he, at least, must be charged with actual knowledge that an act of bankruptcy had been committed.

When the Exploration Mercantile Company, being insolvent, applied for a receiver, it committed an act of bankruptcy. A right at once accrued to the petitioning creditors to have the estate administered in a court of bankruptcy by a trustee to be chosen by

the creditors themselves. When the petition was filed, the jurisdiction of this court commenced. The filing of the petition was "a *caveat* to all the world, and, in effect, an attachment and an injunction."

Mueller vs. Nugent, 184 U. S. 1, 14;
Staunton vs. Wooden, 179 Fed. 61, 62;
York Mfg. Co. vs. Cassell, 201 U. S. 344.

Each of the respondents must be charged with whatever notice or warning is conveyed by the filing of an involuntary petition against the corporation. While the language quoted from Meuller vs. Nugent, *supra,* may not fit every case (York Mfg. Co. vs. Cassell, 201 U. S. 344, 353), it certainly cannot be construed to mean that prior to adjudication a bankrupt "may carry on his business, buy and sell, pay debts, and proceed just as though no petition was filed against him." To concede such a proposition is to admit that in many cases it is within the power of a bankrupt, even after petition filed, to defeat the operation of the act. The trustee, when qualified, is vested by operation of law with the title of the bankrupt as of the date when he was adjudged a bankrupt * * * to all * * * (5) property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him." Section 70–a.

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred or its value, from the person to whom it was transferred, unless he was a bona

fide holder for value prior to the date of the adjudication." Section 70–e. [83]

And finally, receiving "any material amount of the property from a bankrupt after the filing of the petition with any intent to defeat the act" is a criminal offense. Sec. 29–b (4).

From these provisions it follows that property owned by the bankrupt at the time the petition is filed, vests in the trustee, when qualified, as of the date of the adjudication. During the interval between the filing of the petition and the appointment and qualification of the trustee, the title remains in the bankrupt, but it is a title which is liable to be divested. If the property of the bankrupt be conveyed by him with intent to hinder, delay or defraud his creditors, or if there be a conveyance which his creditors might have avoided, it is voidable at the instance of the trustee as against any one except a bona fide holder for value prior to adjudication.

The broad language of the act as quoted above seems to justify the idea that he who deals with non-exempt property of a bankrupt after petition filed, especially if he has actual notice of the filing, does so at his peril. There must be no disposition of the property which will hinder, delay or defraud creditors, or defeat the purpose of the act itself. To this extent, at least, the filing of the petition in bankruptcy was, "in effect, an attachment and an injunction" as against each of these respondents.

In order to protect the estate of an alleged bankrupt, pending adjudication, methods are provided in sections 2 (3), 3–e and 69–a of the bankruptcy act,

whereby the property may be taken into custody of the marshal or a receiver. But manifestly this power can be exercised only when property is in possession of the bankrupt himself, or of some one who holds it for him. This is so because an adverse claimant can be deprived of his possession only by plenary suit. Section 720 of the Revised Statutes of the United States permits a Federal court to stay proceedings in a State court in cases "where such injunction may be authorized by any law relating to proceedings in bankruptcy." Section 11–a of the Bankruptcy Act declares that:

> "A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the [84] dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined."

This section is designed principally for the benefit of the bankrupt himself, in order to prevent creditors from harassing him during the pendency of bankruptcy proceedings, and to secure to him the full effect of his discharge by staying proceedings based on claims against him which are dischargeable in bankruptcy, until he can obtain and interpose his discharge as a defense.

It is very doubtful whether section 11 covers every

proceeding in the State court which may interfere with the administration of the Bankruptcy Act. For instance, litigation which involves the distribution and settlement of the entire estate of an insolvent, is not necessarily based on a claim dischargeable in bankruptcy. The Federal bankruptcy act is of little avail if a State court may never be restrained in its efforts to dissolve an insolvent corporation, dispose of its property, and distribute its assets, until an order of adjudication has been entered. If such be the law, it is easy to conceive that while an adjudication is delayed by a long and stubborn contest, the settlement of an insolvent estate in a State court under State insolvency statutes, may progress to a point where nothing remains for the bankruptcy court but the duty of discharging the bankrupt from his obligations.

If Federal courts are powerless to prevent such a division of procedure; if they are unable to preserve the assets of the bankrupt until the question of his bankruptcy is determined, except in cases where receiver or marshal can take actual possession (sections 69–a, 2 (3), or 3–e) or where injunction may issue under section 11–a, a way has been discovered by which persons who find to their advantage to do so, can defeat the Bankruptcy Act in a large class of cases. It is unthinkable that Congress intended one court should deal with the bankrupt and his creditors, and another court administer his estate. I am of the opinion that Congress has made no such blunder.

By section 2 of the Bankruptcy Act this Court is

"invested * * * with such jurisdiction at law and in equity as will enable it to exercise [85] original jurisdiction in bankruptcy proceedings to * * * (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; * * * (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act."

And by subdivisions (4), (13) and (16) of the same section, it is clothed with ample power to punish violations of the Act, enforce obedience to all lawful orders, and punish persons for contempts committed in bankruptcy proceedings. It is difficult to imagine how more complete authority to preserve the assets of the bankrupt until the question of his bankruptcy is determined, could have been granted.

In re Swofford Bros. Dry Goods Co., 25 Bankr. Repts., 282, 286, it is said that subdivision (15) of section 2 of the Bankruptcy Act "may be availed of to compel anything which ought to be done for, or to prevent anything which ought not to be done against the enforcement of the law; provided the court of bankruptcy otherwise has jurisdiction of the person or the subject matter. * * * A proceeding in bankruptcy is a proceeding in equity, and for the purpose of enforcing and protecting its jurisdiction a court of bankruptcy has all the inherent powers of a court of equity."

In re Hornstein, 122 Fed. 266, Judge Ray says:

"It is plain that the Judge of a court of bank-

ruptcy may lawfully grant such restraining order, operative on and binding litigants in the state court, although strangers to the bankruptcy proceedings, as may be necessary for the enforcement of the provisions of the bankrupt act. This court has no hesitation in holding that express power is given by the act of Congress to courts of bankruptcy to enjoin all persons within its jurisdiction, whether litigants in a State court or elsewhere, from doing any act that will interfere with or prevent the due administration of the bankruptcy act. If this is not true, how frail and worthless is the law."

In Blake, Moffitt & Towne vs. Francis-Valentine Co., 89 Fed. 691, an injunction issued out of the District Court of the Northern District of California, to preserve property of a bankrupt estate, and to restrain the sale of property under process from a State court until a petition in bankruptcy could be filed. The injunction was issued before the bankruptcy proceedings were commenced, and the process was the result of an act of bankruptcy committed by the bankrupt in permitting one creditor to obtain a preference [85½] through legal proceedings in the State court. Judge Hawley refused to dissolve this injunction on the ground that authority is given to courts of bankruptcy to take such steps and exercise such powers as may be necessary to protect the rights of all creditors.

In re Hicks, 133 Fed. 739, it was held that a bankruptcy court had jurisdiction under section 2 (15) to enjoin proceedings against a bankrupt fireman looking to his discharge from a municipal fire depart-

ment, because of his failure to pay his debts.

In re Jersey Island Packing Co., 138 Fed. 625, immediately after an involuntary petition had been filed against an insolvent corporation, the District Court of the Northern District of California issued an injunction restraining one of the officers of the corporation from disposing of its assets under a trust deed. Judge Gilbert, speaking for the Circuit Court of Appeals, said that the filing of the petition was, in substance and effect, an attachment and an injunction, and placed the property of the bankrupt constructively in custody of the court of bankruptcy, and that under subsection 15 of section 2 of the Bankruptcy Act,

> "the Court may, upon proper application and cause shown, restrain not only the debtor, but any other party, from making any transfer or disposition of any part of the debtor's property, or from any interference therewith. Beach vs. Macon Grocery Co., 116 Fed. 143; 53 C. C. A. 463. In that case creditors who had filed an involuntary petition in bankruptcy against their debtor filed therewith an ancillary bill in equity alleging that a third person claimed possession and ownership of property which was in fact a part of the bankrupt's estate. The Circuit Court of Appeals for the Fifth Circuit held that the Court had the power to issue an injunction restraining such person from selling or incumbering the property pending the hearing on the petition, and, in case an adjudication of bankruptcy were made, until the trustee could proceed adversely against the claimant to determine the title to the property."

In New River Coal Land Co. vs. Ruffner Bros., 165 Fed. 881, 886, the Circuit Court of Appeals for the Ninth Circuit appears to be of the opinion that the authority of a court of bankruptcy to enjoin proceedings in a State court in order to administer the estate of a bankrupt through the instrumentality of the general bankruptcy law, is not founded on the fact that the basis of the suit in the State court is a claim dischargeable in bankruptcy, but rather on the fact that jurisdiction of the Federal court to administer on the affairs of insolvent corporations and persons is essentially exclusive. [86]

In re Standard Cordage Company, 184 Fed. 156, a corporation had applied to a New York State court to be dissolved. Subsequently bankruptcy proceedings were initiated, and a receiver appointed in the Federal court. On motion, Judge Hazel vacated the order of appointment, but refused to dismiss the bankruptcy proceedings, and "enjoined the payment of principal or interest on mortgage bonds of the insolvent pending the adjudication, and also the distribution to creditors or bondholders of the assets of the corporation, or any fund realized out of the sale of his real or personal property by order of the State court in the dissolution proceedings, to the end that if an adjudication in bankruptcy is had, such fund, assets, and the property may be distributed under the provisions of the Bankruptcy Act."

In re Hathorn, Fed. Cas. 6,214, on petition of one of three partners, a State court decided that the firm was insolvent, and decreed the appointment of a receiver. Eight days later the petitioning partner was

himself appointed such receiver. One day before this appointment, the other members of the firm filed a petition in the United States District Court, praying that the partnership be adjudged a bankrupt. More than two months later, pending trial of the issue as to whether the firm was bankrupt or not, the partner who was receiver in the State court, was enjoined by the bankruptcy court from making any disposition of partnership property, or from any interference therewith, until the issue of bankruptcy could be tried. It was objected there, as here, that the Court had no jurisdiction to make such an order because all the assets of the firm were in the hands of the State court. Judge Wood declared that the design and purpose of the Bankruptcy Act was to secure the assets of insolvents to their creditors in the very mode pointed out therein, with all due safeguards, protection and summary procedure; and that proceedings such as those in the State court, though not based on a claim against the property of a debtor, could not be permitted to bar the action of a court of bankruptcy or protect the assets of the firm from administration in the bankruptcy court.

In re Electric Supply Company, 175 Fed. 612, 23 Am. Bankr. Rept. 647, it appeared that a receiver had been appointed by a Georgia State court for an insolvent corporation. Within four months thereafter creditors of the [87] corporation filed a petition, praying that it be adjudged a bankrupt, because, being insolvent, it had applied to said State court for a receiver for its property.

The case is singularly like the one at bar, particu-

larly in the bankrupt's statement of the conditions which led to the application for a receivership in the State court. The assets of the corporation exceeded its liabilities. It was impossible to raise necessary capital to meet its obligations; its promissory notes and accounts were overdue, and it was threatened with litigation. The petition in the State court was sworn to by the president of the company; he was then appointed receiver. It was insisted that the receiver's management was prudent, economical and profitable; that creditors holding more than two-thirds of the company's indebtedness were content with the receivership, and that the injunction issued by the Federal court against the receiver was operating to the disadvantage of creditors.

On the hearing of the rule to show cause, after discussing the bill in the State court, Judge Speer said:

> "It is true that the alleged bankrupt, with some astucity, is careful to say that it is not insolvent. * * * But the denial is unimportant in view of the recitals showing its utter incapacity to pay its debts. Indeed, the scheme of the bill, if effective, would create a special bankruptcy proceeding for the Electric Supply Company, not only lacking in that uniformity of operation required by the national law, but as restrictive in territory as it is peculiar and unique in other respects. It is equally clear that the proceeding filed by the Electric Supply Company in the State court was an act of bankruptcy. * * * Since the petition was filed within four months antecedent to the bankruptcy, and it discloses the complete insolvency of

> the corporation itself, the provisions of the bankruptcy law would become operative, and the court of another jurisdiction would have no right to sequester the property and restrain creditors otherwise entitled to proceed in the bankruptcy court."

Pending adjudication, Judge Speer, on *ex parte* application refused to appoint a receiver, but granted a temporary injunction, restraining the receiver of the State court from disposing of the property of the corporation. On the hearing of the rule to show cause the injunction was continued, and a receiver was appointed and directed to apply in terms of suitable respect to the State court for the property.

I am therefore constrained to find, under the foregoing authorities, that this Court had the power to make the order and injunction in question, and that their issuance is amply justified in the proof offered at the [88] hearing of the rule to show cause.

The fact that Wylie and Stone, and probably Hobbs, acted under advice of counsel, under the circumstances carries but little weight. It is not shown that there was a full disclosure to counsel, or, indeed, that any disclosure was made on which the alleged advice was given. Without such a showing, the advice given neither justifies nor mitigates the wrong committed in pursuance of such advice; it rather suggests that a full statement might be disadvantageous to client or counsel, or perhaps to both.

> "No one has a right," says Judge Jackson in Ulman vs. Ritter, 72 Fed. 1000, 1003, "to determine for himself whether he will respect or disregard an order of court, and if he does so of his own volition,

or in pursuance of legal advice, he merely takes the law into his own hands, and must answer for his conduct, whether the order of the court was right or wrong."

9 Cyc. 25; Royal Trust Co. vs. Washburn, etc. Ry. Co., 113 Fed. 531; Queen & Co. vs. Green, 170 Fed. 611; Leber vs. United States, 170 Fed. 881; Cary Mfg. Co. vs. Acme Co., 108 Fed. 874; In re Wilk, 155 Fed. 943.

The fact that the $1,000 received by Mr. Thompson and Mr. Morehouse from Mr. Wylie was paid ostensibly as attorneys' fees does not, in my opinion, excuse them. Their appropriation of the money was in defiance of the order of this Court. Their services were performed in an unsuccessful attempt to enable an insolvent corporation, guilty of an act of bankruptcy, by the very act of bankruptcy to defeat the jurisdiction of this Court. Their efforts resulted in litigation, obstructing the bankruptcy proceedings, and causing delay and great expense, with no benefit whatever to the estate. Even though they believed they were within their legal rights, and that the State court had priority of jurisdiction, that fact affords no reason why the estate should pay them for making such an error, or for performing services which were of no benefit.

In re Zier & Co., 142 Fed. 102.

The same observations may be applied to C. E. Wylie and his claim that the $1,000 received by him was in payment for his services as receiver. His services were detrimental to the estate, and more than unprofitable to the creditors. Furthermore, the order

appointing him was void.

In re Rogers and Stefani, 156 Fed. 267.

The corporation was hopelessly insolvent when the petition was filed in the State court. Mr. Kennedy's affidavit shows this fact was known to [89] W. C. Stone at the time. Indeed, it is difficult to imagine any practicable method by which Mr. Stone, the president, or Mr. Wylie, the vice-president and manager of the corporation, or Mr. Hobbs, its bookkeeper, could have avoided full and definite knowledge of the fact that the company was insolvent. Had the Exploration Mercantile Company been solvent at that time, or had Stone and Wylie with some show of reason actually believed it to be so, we should have a different situation. The State court unquestionably had exclusive jurisdiction, after proper procedure taken, to wind up the affairs of the corporation, if solvent, but it was not solvent. This fact being known to Stone, and probably to Wylie and Hobbs also, admits no other inference than that Wylie and Stone deliberately concealed this controlling fact from the State court, and sought its assistance to deprive creditors of their undoubted right to have the estate administered and distributed in a bankruptcy court. If the financial condition of the corporation had been disclosed in the State court as it was in the Federal court, there would have been no conflict of jurisdiction.

The fact that W. C. Stone threatened suit for rent and treble damages, and demanded that the premises be vacated, is no defense to Wylie, Thompson or Morehouse for their conduct in permitting Stone to

appropriate the $3,000. The Court had ample power to enjoin Mr. Stone from any such interference with the administration of the estate. This follows from the conclusions arrived at earlier in this opinion, and is supported in In re Chambers Calder & Co., 98 Fed. 865; In re Schwartzman, 167 Fed. 399.

In reply to the argument that respondents had no thought of treating this Court with disrespect, it is sufficient to say they still retain the moneys taken by them from the bankrupt estate.

The fact that Stone on the very day he was served with the restraining order and injunction, gave notice that he would raise the rent from $500 to $1500 per month, and the actual collection and payment of $1500 for the month of December, is expressive of defiance rather than respect for the orders of this court. This observation applies with no less force to counsel who advised the payment and to the receiver who made it, than to the president of the company who actually received it. If it were proper [90] for Stone to demand and receive $1,500 per month, he might with equal propriety have demanded and received $5,000. The stores were closed in obedience to the order of this Court, but the respondents were in no wise deterred by the same order from demanding and receiving for themselves the moneys of the bankrupt corporation. Self-interest appears to have been something of a factor in determining the amount and character of respect due this Court.

It is objected that respondents were not, and could not have been, made parties to the original bankruptcy proceedings; therefore the Court had no juris-

diction over them, and they could not be enjoined at all. It is sufficient to say that under section 2 (15) quoted above, the bankruptcy court has power between the filing of the petition and adjudication, as well as afterwards, to enjoin persons within its jurisdiction, whether parties to the bankruptcy proceeding or not, from making any transfer or disposition of any part of the debtor's property, or from doing any other thing which will interfere with the administration of the Bankruptcy Act. The petition for such an injunction should be filed and the injunction issued in the bankruptcy proceeding itself. I Remington on Bankruptcy, secs. 359, 361; In re Jersey Island Packing Co., 138 Fed. 265; In re Globe Cycle Works, 2 Am. Bankr. Rep. 447.

Section 2 (13) of the Bankruptcy Act supplies the Court with authority to enforce obedience to its lawful orders, not only from bankrupts, but also from other persons.

In Boyd vs. Glucklich, 116 Fed. 135, the Court declares that "Any act, matter, or thing which any United States court may punish as a contempt may be punished as such by a court of bankruptcy."

Section 725, Rev. Stats. U. S. vests the federal courts with power "to punish by fine or imprisonment, at the discretion of the Court, contempts of their authority; * * * and a disobedience or resistance * * * by any party, juror, witness *or other person* to any lawful writ, process, order, rule, decree or command of the said courts."

"To render a person amenable to any injunction, it is neither necessary that he should have been a

party to the suit in which the injunction was issued, nor have been actually served with a copy of it, so long as he appears to have had actual notice." [91]

In re Lennon, 166 U. S. 548; American Steel etc. Co. vs. Wire Drawers' Union, 90 Fed. 598, 604; Phillips vs. Detroit, 19 Fed. Cas. No. 11,101.

None of the respondents were formal parties to the bankruptcy proceeding. The order which restrained Mr. Wylie and the Exploration Mercantile Company from selling or otherwise disposing of its property, does not include or restrain Mr. Stone, Mr. Morehouse, Mr. Thompson, or Mr. Hobbs by name, or by any general description. The injunction prohibiting further prosecution of the suit in the State court, and all further steps and proceedings therein, runs against the Exploration Mercantile Company, Mr. Stone, Mr. Wylie, and the agents, servants, attorneys and counselors of each of them. Mr. Hobbs, Mr. Thompson and Mr. Morehouse are not expressly named therein. The omission of the name of Mr. Stone, or the name of any other respondent, however, did not give any authority or permission to advise, persuade, or compel Mr. Wylie to disobey or ignore the orders of this Court. Orders and injunctions are among the instruments with which courts accomplish their ends, and perform their duties. Any person, be he party or not, who knowingly thwarts the purpose of the Court, either by resisting its commands, or wilfully counseling, aiding, abetting, inducing or compelling the party who is enjoined, to resistance or

disobedience, acts at his peril. While such conduct, under some authorities, may not constitute a technical breach of the injunction, it is, nevertheless, disrespectful to the Court, and may be treated and punished as contempt, under section 725 *supra.*

It is said In re Reese, 107 Fed. 942, 945, that "The power to punish for contempt is not limited to cases of disobedience by parties to the suit, of some express command or rule against them, but, subject to the limitations imposed by section 725, *supra,* is coextensive with the necessity of maintaining the authority and dignity of the court."

It is the usual practice in granting an injunction against a corporation to extend the injunction to officers, attorneys, agents and employees of the company. And this is just as effectual against such servants, officers, employees and attorneys as though they were parties defendant to the original bill.

Sidway vs. Missouri Land & Live Stock Co., 116 Fed. 381, 390; Toledo etc. Ry. Co. vs. Pennsylvania Co., 54 Fed. 746; Hedges vs. Court, 7 Pac. 767; [92]

Such an injunction is binding, not only on the corporation, but on each individual who acts for the corporation in the transaction of its business, provided he has knowledge of the writ and its contents.

Ex parte Lennon, 64 Fed. 320; People vs. Sturtevant, 59 Am. Dec. 536, 546; Morton vs. Superior Court, 4 Pac. 489; 2 High on Inj., sec. 1443.

The rule that a stranger to the suit can be punished for contempt rests not only on the clear language of

the statute itself, but on the broad doctrine that the power to make an order carries with it an equal power to enforce the order by punishing those who disobey or resist it. Otherwise the lawful commands and purposes of the Court might be thwarted, and brought to naught by the resistance of strangers. In Seaward vs. Paterson, 1 Ch. 545, 76 L. T., N. S., 215.

"An injunction was issued against Paterson to restrain him from holding glove-fights or boxing contests on certain premises. One Murray, who had later acquired possession of the premises and conducted boxing contests thereon, was cited for contempt. It was insisted in his behalf that he was neither a party to the action nor an agent or servant of such party, and that consequently he could not be held. He was adjudged guilty of contempt, however, on the ground of knowingly aiding and assisting in doing that which the Court had prohibited. In approving of this action on the part of the trial court, the court of appeals drew a distinction between the kind of contempt here complained of and that which consists in a disobedience to an order by a party to the suit. Among other things, Lindley, L. J., after observing that Murray was not a party to the action, either first or last, but that he knew all about the order and was responsible for the violation of it, said: 'Now, let us consider what jurisdiction the court has to make an order against Murray. There is no injunction against him. He is no more bound by the injunction granted against Paterson than any other member of the public. He is bound, like other members of the

public, not to interfere with, and not to obstruct, the course of justice; and the case, if any, made against him must be this—not that he has technically infringed the injunction which was not granted against him in any sense of the word, but that he has been aiding and abetting others in setting the court at defiance, and deliberately treating the order of the court as unworthy of notice. If he has so conducted himself, it is perfectly idle to say that there is no jurisidiction to attach him for contempt as distinguished from a breach of the injunction. * * * I confess that it startled me, as an old equity practitioner, to hear the jurisdiction contested upon the facts in this case. It has always been a familiar doctrine to my brother Rigby and myself that the orders of the Court ought to be obeyed, and could not be set at naught and violated by any member of the public, either by interfering with the officers of the court, or by assisting those who are bound by its orders.' '' To the same effect see:

Bessette vs. W. B. Conkey Co., 194 U. S. 324;

Wellesley vs. Earl of Mornington, 11 Beav. 181.

In re Reese, *supra,* is much relied on by respondents. That case arose out of labor difficulties in Kansas. An injunction had been issued [93] out of the Federal court against some 46 named persons, and other citizens of Kansas, "who have or may combine or confederate with them, restraining interference with complainant and its employees." Reese came with three hundred men from Iowa. It is charged that he interfered with complainant's miners, but not

that he aided or abetted defendants, or confederated with them, or that he was an agent, servant, or employee. He was not a citizen or resident of Kansas. He seems to have acted independently of the defendants. The Court held that he could not be punished for violating the injunction, because he was neither a party to the case itself, nor agent, servant, employee or attorney of any part or parties thereto, and inasmuch as he had not been charged with aiding, abetting or confederating with them, he was discharged.

In the present case all the evidence tends to show that Wylie, Stone, Morehouse and Thompson were acting together as allies and confederates; that Mr. Stone was their leader. The charge is that Stone willfully and contemptuously demanded and received from said C. E. Wylie certain sums of money. Thompson and Morehouse are charged with actively counseling and advising Wylie to disobey the orders of this court, and to pay the money demanded by Stone.

This distinction is a very important one, and it brings the conduct of the respondents just named clearly within the following rule stated by Judge Adams in the Reese case:

> "It is entirely consonant with reason, and necessary to maintain the dignity, usefulness, and respect of a court, that any person, whether a party to a suit or not, having knowledge that a court of competent jurisdiction has ordered certain persons to do or abstain from doing certain acts, cannot intentionally interfere to thwart the purposes of the court in making such order. Such an act, inde-

pendent of its effect upon the rights of the suitors in the case, is a flagrant disrespect to the Court which issues it, and an unwarrantable interference with, and obstruction to, the orderly and effective administration of justice, and as such, is and ought to be treated as contempt of the court which issued the order."

In Huttig Sash & Door Co. vs. Fuelle, 143 Fed. 363, there was a temporary order enjoining defendants from boycotting complainant in person or through the agency of others. Several of the defendants were cited to show cause why they should not be punished for contempt. With them were joined three persons, Bohnem, Crowe and Mellville, who were not defendants in the original suit, and were not named in the restraining order. They were charged, [94] however, with aiding, abetting and assisting others in violating the restraining order. All were found guilty of contempt, including the three parties last named.

The case at bar is like the one just cited. Stone, Morehouse and Thompson are not named as defendants. The restraining order does not run in terms against agents, employees, or attorneys, but it is charged that Stone willfully and contemptuously demanded and received from C. E. Wylie certain sums of money; that Thompson and Morehouse willfully and contemptuously demanded and received the sum of $1,000; and that Thompson advised and counseled Wylie to pay Stone's demand. The evidence shows that Stone on the very day he was served with the restraining order gave notice that the rent of the

building owned by him and occupied by the company would be raised from $500 to $1,500 per month; and later he actually collected $1,500 rental for the month of December. He also threatened to bring suit for rent and treble damages, and notified Wylie to vacate. Morehouse and Thompson advised the payment of the money to Stone. The conduct charged and proven certainly is that of counseling, aiding and abetting Wylie in his violation of the restraining order.

In Sloan vs. The People, 115 Ill. App. 84, 89, it was held that under charge of violating an injunctional order a respondent may be convicted of aiding and abetting others in such violation as the former charge includes the latter.

The charge against Hobbs is that he knowingly violated the order by receiving $700. This he did receive with full knowledge of the injunction, and this is all which is proven against him.

The evidence clearly shows that the injunction against taking any further steps in the suit in the State court was violated by Wylie, Thompson and Morehouse, and that each had a part in applying to the State court for an order to sell property. Each is guilty of contempt in that matter, and the fine for that offense is fixed for each at $1.00.

I find that Mr. Wylie is guilty of contempt in that he violated the order restraining him from disposing of the property of the Exploration Mercantile Company, by paying $3,000 to Mr. Stone, $1,000 to Mr. Thompson [**95**] and Mr. Morehouse, $700 to Mr. Hobbs and $1,000 to himself. For this he will be fined in the sum of $1,000.

Mr. Stone, Mr. Thompson and Mr. Morehouse are found guilty of contempt in that each of them knowingly, willfully and contemptuously counseled, advised and induced Mr. Wylie to violate said restraining order, and each aided him by appropriating to his own use money belonging to the company. The fines are fixed as follows: Mr. Stone $3,000; Mr. Morehouse, $500; Mr. Thompson, $500; Mr. Hobbs, $200.

Counsel will prepare orders appropriate to the foregoing findings, and add thereto the provision that each respondent herein found guilty of contempt pay his fine within ten days after service on him of a certified copy of said order, otherwise he will be committed to the County Jail of Ormsby County, Nevada, until payment of his fine, or until further order of this Court.

The fines of Mr. Wylie and Mr. Stone, $1,000 and $3,000, will be paid to the Clerk of this court for the benefit of the bankrupt estate. The fines of Mr. Thompson and Mr. Morehouse will be paid to the Clerk of this court, and by him paid to the creditors prosecuting these contempt proceedings, as partial compensation for their expenses, costs and attorneys' fees herein. The remaining fines will go to the Government.

[Indorsed]: No. 103. In the District Court of the United States, in and for the District of Nevada. In the Matter of the Exploration Mercantile Co. (a Corporation), Bankrupt. And the Application of P. F. Carney in Said Proceeding by Affidavit, and the Order of Hon. E. S. Farrington, Judge of Said Court, of Date July 9th, 1909, Issued to W. C. Stone, C. E.

Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc. Opinion. Filed January 29th, 1912, at 10 o'clock A. M. T. J. Edwards, Clerk. [96]

[Petition for Writ of Error.]

In the District Court of the United States in and for the District of Nevada.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, a Bankrupt, and the Application of P. F. Carney, in Said Proceeding by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court, of Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson, and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc.

The above-named defendants, H. V. Morehouse and I. S. Thompson, feeling *themselves by* the orders and Judgments entered on the 12th day of April, 1912, in the above-entitled proceeding, come now in proper persons, as attorneys for themselves, and petition said Court for an order allowing them, said defendants, to prosecute a Writ of Error to the Hon. The United States Circuit Court of Appeals, for the Ninth Circuit, under and according to the laws of the United States, in that behalf made and provided, and also that an order be made fixing the amount of security which the defendants shall give and furnish upon

said Writ of Error, and that upon giving such security, all further proceedings be stayed and suspended until the determination of said Writ of Error by the United States Circuit Court of Appeals for the Ninth Circuit, and your petitioners will ever pray.

H. V. MOREHOUSE and
I. S. THOMPSON,
In Proper Persons,
Attorneys for Petitioners.

[Indorsed]: No. 103. In the District Court of the United States, in and for the District of Nevada. In the Matter of Exploration Mercantile Company, a Corporation, Bankrupt. And the Application of P. F. Carney, in Said Proceeding by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court, of Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc. Petition for Writ of Error. Filed April 22, 1912, at 5 o'clock and 30 Minutes P. M. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. [97]

[Assignment of Errors.]

In the District Court of the United States, in and for the District of Nevada.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, a Bankrupt, and the Application of P. F. Carney, in Said Proceeding by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court,

of Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc.

Come now the defendants, H. V. Morehouse and I. S. Thompson, and file the following assignment of errors, upon which they will rely upon their prosecution upon the Writ of Error, in the above-entitled cause, from the orders and judgments made and entered on the 12th day of April, 1912, in said cause or proceeding, above entitled.

I. That the present District Court of the United States, in and for the District of Nevada, had no power, authority or jurisdiction, to make the finding of facts or give, grant, or enter judgment in the above-entitled proceeding, upon a cause or complaint or affidavit or proceeding, charging a contempt of an order, or injunction, or rule of the District Court of the United States, in and for the District of Nevada, which said last mentioned District Court in and for the District of Nevada, ceased to exist, on the first day of January, 1912, under and by virtue of An Act of the Congress of the United States, entitled "An Act to Codify, Revise, and Amend the laws relating to the judiciary," approved March 3d, 1911, in this, to wit, that the old United States District Court for the State of Nevada was abolished and forever ceased to exist on the 1st day of January, 1912, and that in the acts charged against these defendants were charged to have been done and performed before the 9th day of July, 1909, and therefore if any contempt was com-

mitted, such contempt was against the old District Court of the United States, and could only be punished by that court, and none other, and the present District Court of the United States, has no [98] jurisdiction in the premises, and the orders and judgments herein are void.

II. That the proceedings herein are for a criminal contempt, and so much of the judgments and decrees herein, as fines these defendants each in the sum of $500.00 as remedial compensation, for expenses, costs and attorneys' fees for the prosecution of these defendants, or the petitioning creditors of affiants in these proceedings, is beyond the power and jurisdiction of this court, and further, that in the affidavit of P. F. Carney, no prayer of any kind or relief of any kind is demanded or requested in behalf of the affiants or petitioners, and the Court could not have the power to grant civil relief where none is asked or demanded.

III. That the Court had no power or authority to issue the injunction herein, and the same was and is void for the reason that before the bankruptcy proceeding herein, the property of the bankrupt corporation had passed into the possession of the State Court, and was not in the possession of the bankrupt defendant, and that no jurisdiction of property could vest in the United States District Court, as a court of bankruptcy, until after the defendant corporation had been adjudicated a bankrupt; and that neither of these defendants were ever made parties to the bankrupt proceeding.

IV. That C. E. Wylie was at all the times men-

tioned in these proceedings, the duly qualified receiver of the State Court, and as such receiver could not be enjoined by the District Court of the United States, and his possession and control of the property of the corporation bankrupt, was absolute, and under the control and orders of the State Court until the corporation had been adjudicated bankrupt; and his duties as such receiver was beyond the injunctive process of the bankrupt Court, until by adjudication in bankruptcy, the title and possession of the bankrupt's property had been divested from the State Court and vested in the bankrupt court, and all the acts of these defendants as attorneys for said receiver could not be in violation of the injunction of the court of bankruptcy, because that injunction was void and of no effect, as against said Wylie, and these defendants.

V. That the injunction was beyond the power and jurisdiction of said bankrupt court, because under and by sec. 720, Rev. St. of the United States, the court had no power to issue an injunction to stay the proceedings in [99] the State court, sitting as a court of Equity or while exercising equity powers. Its only authority was that authorized by the bankrupt law, and that law, only authorized a stay order against "A suit founded upon a claim from which a discharge in bankruptcy would be a release." And the suit in the State court was upon no such claim; therefore the injunction was beyond the jurisdiction of the court to issue.

VI. The injunction was not effective against Wylie, as receiver, or Thompson, or Morehouse, be-

cause they were not parties to the bankrupt proceedings, and all their acts were as officers of the State court, in the proceedings in that court, and of which that court only had jurisdiction, until an adjudication in bankruptcy, and they are not charged with anything done or said after adjudication.

VII. The possession of the property being in the lawful possession of the receiver of the State court, the bankrupt court could not make any order or injunction restraining or preventing him, from doing his duty as the arm of the State court, and his possession being adverse to the bankrupt and the petitioning creditors, and he not being the agent or employee of the bankrupt, he could not be proceeded against by any summary process of the United States Court, and his lawful possession of property interfered with, without violating sec. 1 of art. XIV of the Constitution of the United States, because he would be entitled to the "due process of law," in that he should be made a party to the bankrupt proceeding, due service of process, the right to appear and defend, and the right of trial by jury and the stay of proceedings against him, or an injunction against him, was a contempt of the State court, and a process he *dared* not obey, and these defendants were only acting as attorneys for the receiver, and are nowhere charged as acting otherwise, in violation of the injunction.

VIII. The injunction and stay order were only preliminary and not perpetual, and therefore on the 9th day of July, 1909, when the adjudication in bankruptcy took place, the stay order and injunction not having been continued in force by any order of the

court, they ceased to be of any effect, and these proceedings being after that time, the jurisdiction of the court in that behalf ended.

IX. The answers of these defendants being under oath, and the truth [100] thereof, not being denied, is a complete defense, and the court had no power to render judgment against them.

X. The proceedings in this case being criminal, and so held as the law of this case in Morehouse et al. vs. Pacific Hardware & Steel Co. et al., 177 Fed. Rep. 337, the defendants cannot be held guilty, except beyond a reasonable doubt, and therefore the judgment of the Court cannot be upheld, because it fully appears by the records herein, that these defendants were acting under an honest belief, that their acts were lawful.

XI. The Receiver and these defendants could not be held legally for contempt, because all the things of which they are charged are and were acts done under the authority of said State court, and that all advice and receipt of moneys were through, by and under the authority of said State court, and these defendants could not do anything relating to the property or moneys in the hands of said receiver except by the authority of said State court, and therefore it was not in their power to obey the order of said U. S. Court, as it was their duty to obey the said State court, until an adjudication was had in said bankrupt court.

XII. These defendants were not in contempt by the acceptance of the sum of $1,000.00 as part payment of their services, from said receiver, as ordered by said State court, for the reason that even though

the filing of a petition in involuntary bankruptcy had been *ipso facto* the destruction of jurisdiction in the State court, and put the duty of that court to give the possession of the estate in the hands of its receiver over to the bankrupt court, it yet had the duty to settle its accounts with its receiver, and allow him his counsel fees and other expenses before transferring the assets, and this payment of one thousand dollars it passed upon and allowed, as just and proper, and its jurisdiction as State court in that behalf, superseded all proceedings in the bankrupt court.

XIII. Further, it appears by the affidavit of P. F. Carney, upon which these proceedings are based, that Giant Powder Company, Consolidated, Pacific Hardware and Steel Company, and J. A. Folger and Company, were the persons or corporations upon whose petition or affidavit made by one J. L. Kennedy, the stay order and injunction were issued herein, and yet we find by the affidavit or answer of defendant I. S. Thompson, herein, that on the [101] 18th day of March, 1909, these same persons or corporations recognize and invoke the jurisdiction of the said State court, upon this very payment of $1,000.00 to these defendants, and by so doing upon their own motion, procure the allowance of the same, as "an extremely reasonable sum," and thereby are estopped from asking or conferring jurisdiction upon the U. S. District Court, to punish these defendants as for a contempt, and the court could not allow them the penalty of $500.00, against each of these defendants, as compensation for their expenses, costs and attorneys' fees, for by their own acts the same was settled,

allowed and satisfied, and the action of said State court was binding upon them, and not thereafter subject to dispute and collateral attack.

XIV. That it appears from the affidavit of I. S. Thompson herein, that a creditor of said corporation, the assets of which were in the possession of said State court, to wit, W. P. Fuller & Co., petitioned said State court long prior to any adjudication in bankruptcy, and obtained the order of said State court, commanding the receiver to file a complete inventory, and that under such proceeding not initiated by these defendants or the said receiver, that an order to show cause why the receiver should not sell the estate, etc., was made by the Court, and that these defendants did not apply nor did the receiver apply for any such order, and therefore these defendants were not in contempt of the order or injunction herein.

XV. It appears upon the face of the petition in bankruptcy, that no prayer for an injunction, or for a stay order was made therein, or that these defendants or said receiver was ever a party or parties to said proceeding; and the affidavit made by J. L. Kennedy gives the court no jurisdiction to issue either a stay order or an injunction, for the reason there is no allegation of insolvency or a want of a plain, speedy or adequate remedy at law, but, on the contrary, it clearly appears that the estate of the then alleged bankrupt was in the hands of a receiver of the State court having jurisdiction, and by all legal proceeding was necessarily under heavy bonds, fully protecting the estate in his hands, and that no injury could result to the petitioners, and the bankrupt law

gave them, then and there, a complete legal remedy by giving bond to the Court, and asking the [102] appointment of a receiver or the U. S. Marshal to take possession of the estate, or had they not so desired to do, upon adjudication in bankruptcy, the appointed trustee had full power under the bankrupt law to sue and recover the full value of the estate by an action at law, so that the affidavit was wholly wanting in merit or facts, to invoke the equitable powers of the Court, and the Court was without jurisdiction to issue the stay order or the injunction.

XVI. It fully appears by the affidavits of these defendants, as to when, how and why they acted, and that they acted in good faith, and that they and each of them are attorneys at law, representing so far as this proceeding is concerned, only the receiver of the State court, and that under In re Watts, 190 U. S. 1, they are not guilty of contempt and cannot be so held, and the rule is, that their answers cannot be traversed.

XVII. That the judgments are wrong and contrary to law, because upon the affidavit of P. F. Carney no relief of any kind is demanded, and as the contempt, if any, was not in the presence or hearing of the Court, and must be founded upon affidavit, the affidavit is wholly insufficient, and does not give any authority to the Court to adjudge defendants guilty, either civilly or criminally.

XIX. Upon these grounds, alleged as error in the action of the Court herein, these defendants pray, that the judgment of the Court be reversed, and that the orders and judgments against them be set aside and such directions be given that full force and efficacy

may inure to these defendants by reason of the defense set up in their answers or affidavits, and that it be held they and each of them are not guilty of a contempt of Court and that the said United States Court be ordered to dismiss these proceedings, set aside and annul its action against these defendants and each of them.

H. V. MOREHOUSE, and
I. S. THOMPSON,
In Proper Person,
Attorneys for Defendants and Plaintiffs in Error.

[Indorsed]: No. 103. In the District Court of the United States, in and for the District of Nevada. In the Matter of Exploration Mercantile Company, a Corporation, Bankrupt. And the Application of P. F. Carney, in Said Proceeding by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court, of Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson, and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc. Assignment of Errors. Filed April 22, 1912, at 5 o'clock and 30 minutes P. M. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. [103]

[Order Allowing Writ of Error.]

In the District Court of the United States, in and for the District of Nevada.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, a Bankrupt, and the Application of P. F. Carney, in Said Proceeding by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court, of Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc.

At a stated term, to wit, the February term, A. D. 1912, of the District Court of the United States, for the District of Nevada, held at the courtroom of said court, in the City of Carson, State of Nevada, on the 22 day of April, 1912,—Present: The Hon. E. S. Farrington, District Judge, in the Matter of Exploration Mercantile Company, a Corporation, a Bankrupt, and the Application of P. F. Carney, in said Proceeding by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court, of Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc., upon Motion of H. V. Morehouse and I. S. Thompson, Attorneys in Proper Person, for Themselves as Defendants, and the Filing of a Petition for Writ of Error and Assignment of Error:

It is ordered that a Writ of Error be and is hereby allowed to have reviewed in the United States Circuit Court of Appeals, Ninth Circuit, the judgments and orders heretofore entered herein against said defendants, H. V. Morehouse and I. S. Thompson, and the amount of the bond on said Writ of Error be and is hereby fixed at Fifteen Hundred ($1,500.00) Dollars, for the prosecution of said Writ; said undertaking shall operate as a *supersedeas,* and all proceedings against the said Thompson and Morehouse are hereby stayed until the said Writ shall be heard and determined in said Circuit Court of Appeals.

E. S. FARRINGTON,
District Judge. [104]

[Indorsed]: No. 103. In the District Court of the United States, in and for the District of Nevada. In the Matter of Exploration Mercantile Company, a Corporation, Bankrupt. And the Application of P. F. Carney, in Said Proceeding by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court, of Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson, and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc. Order Allowing Writ. Filed April 22, 1912, at 5 o'clock and 30 Minutes P. M. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. [105]

In the District Court of the United States, in and for the District of Nevada.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, a Bankrupt, and the Application of P. F. Carney, in Said Proceeding by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court, of Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc.

Bond on Writ of Error.

Know All Men by These Presents, that we, H. V. Morehouse and I. S. Thompson, as principals, and T. H. Cline and W. St. Pierre as sureties, are held and firmly bound unto the United States of America and to the Giant Powder Company, Consolidated, a corporation; Pacific Hardware & Steel Company, a corporation; J. A. Folger & Company, a corporation, petitioners herein, in the sum of Fifteen Hundred Dollars ($1500.00), to be paid to the said petitioners, their executors, administrators, successors or assigns, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives, executors or administrators firmly by these presents. Sealed with our seals and dated the 13th day of May, 1912.

Whereas, the above-named defendants, H. V.

Morehouse and I. S. Thompson have sued out a writ of error to the United States Circuit Court of Appeals, for the Ninth Circuit, to reverse the judgment and orders in the above-entitled cause given, made and entered on the 12th day of April, 1912, by the District Court of the United States in and for the District of Nevada.

Now, therefore, the condition of this obligation is such that if the above-named H. V. Morehouse and I. S. Thompson shall prosecute said writ to effect and answer all costs and damages, if they shall fail to make good their plea, then this obligation shall be void, otherwise it will remain in full force and virtue. [106]

H. V. MOREHOUSE. [Seal]
I. S. THOMPSON. [Seal]
T. H. CLINE. [Seal]
W. ST. PIERRE. [Seal]

United States of America,
State of Nevada,
County of Esmeralda,—ss.

T. H. Cline and W. St. Pierre being first duly sworn, each for himself and not one for the other deposes and says: I am the same person whose name is subscribed to the foregoing bond as the surety therein, and I state that I am worth the sum specified as a penalty thereof, over and above all my just debts and liabilities, exclusive of property which is exempt from execution.

T. H. CLINE. [Seal]
W. ST. PIERRE. [Seal]

Subscribed and sworn to before me this 13th day of May, 1912.

[Seal] CHAS. HATTON,
Notary Public in and for the County of Esmeralda, State of Nevada.

My commission expires Oct. 15, 1915.

The foregoing bond is approved as an undertaking to prosecute the writ of error, and also approved as a *supersedeas,* as to said Morehouse and Thompson.

Dated May 16th, 1912.

T. J. EDWARDS,
Clerk U. S. Dist. Court, Dist. Nevada.

[Indorsed]: No. 103. In the District Court of the United States, in and for the District of Nevada. In the Matter of Exploration Mercantile Company, a Corporation, Bankrupt. And the Application of P. F. Carney in said Proceedings by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court, of Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc. Bond on Writ of Error. Filed May 16, 1912. T. J. Edwards, Clerk. [107]

[Writ of Error.]

In the District Court of the United States, in and for the District of Nevada.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, a Bankrupt, and the Application of P. F. Carney, in Said Proceeding by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court, of Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc.

The President of the United States, to the Honorable E. S. FARRINGTON, the Judge of the District Court of the United States, for the District of Nevada:

Because in the record and proceedings, as also in the rendition of judgment, which is in the District Court before you, wherein Giant Powder Company, Consolidated, Pacific Hardware and Steel Company, a Corporation, and J. A. Folger and Company, upon affidavit of P. F. Carney, petitioners herein and H. V. Morehouse and I. S. Thompson, defendants and plaintiffs in error, a manifest error has happened to the great damage of the defendants H. V. Morehouse and I. S. Thompson, plaintiffs in error, as by their complaint appears, we being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this

behalf, we command you if judgment be therein given that then under and upon your seal distinctly and openly you send the record and proceeding aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the [108] same at the City of San Francisco, State of California, on the 17th day of May, 1912, in the said Circuit Court of Appeals, to be then and there held that the record and proceedings aforesaid may be inspected; that the said Circuit Court of Appeals may further cause to be done therein to correct that order, that of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 22d day of April, 1912.

Attest: My hand and seal of the United States District Court for the District of Nevada, at the Clerk's Office, at Carson City, County of Ormsby, State of Nevada, on the day and year last above written.

T. J. EDWARDS,
Clerk of the District Court of the United States, District of Nevada.

By H. D. EDWARDS,
Deputy.

Allowed this 22nd day of April, 1912.

[Seal] E. S. FARRINGTON,
Judge of the United States District Court, District of Nevada. [109]

[Endorsed]: No. 103. In the District Court of the United States, in and for the District of Nevada. In

the Matter of Exploration Mercantile Company, a Corporation, Bankrupt, and the Application of P. F. Carney, in Said Proceeding by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court, of Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank C. Hobbs, I. S. Thompson and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc. Writ of Error. Filed April 22, 1912, at 5 o'clock and 30 minutes, P. M. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. [110]

[Citation.]

In the District Court of the United States, in and for the District of Nevada.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, a Bankrupt, and the Application of P. F. Carney, in Said Proceeding by Affidavit, and the Order of Honorable E S. Farrington, Judge of Said Court, of Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc.

United States of America,—ss.

The President of the United States, to Giant Powder Company, Consolidated, a Corporation, Pacific Hardware and Steel Company, a Corporation, and J. A. Folger and Company, a Corporation, Petitioners, by and Through P. F. Carney, and

J. L. Kennedy, Detch and Carney, and E. E. Roberts, Esquires, Attorneys for said Petitioners:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty (30) days from the date of this Writ, pursuant to a Writ of Error, filed in the Clerk's office of the District Court of the United States, for the District of Nevada, wherein H. V. Morehouse and I. S. Thompson, are plaintiffs in error, and you are the defendants in error, to show cause, if any there be, why the judgment in said Writ of Error mentioned should not be corrected, [111] and speedy justice should not be done to these plaintiffs in error in that behalf.

Witness, the Honorable E. S. FARRINGTON, Judge of the District Court of the United States for the District of Nevada, this 22 day of April, 1912, of the Independence of the United States, the one hundred and thirty-sixth.

District Judge of the District Court, of the United States, District of Nevada.

E. S. FARRINGTON,
Judge.

[Seal] Attest: T. J. EDWARDS,
Clerk.

By H. D. Edwards,
Deputy.

Received a copy of the foregoing citation this 26th day of April, 1912.

J. L. KENNEDY,
E. E. ROBERTS,
DETCH & CARNEY,
P. F. CARNEY,

Attorneys for Giant Powder Company, Consolidated, a Corporation; Pacific Hardware and Steel Company, a Corporation, and J. A. Folger and Company, a Corporation, Petitioners.

Good cause appearing therefor, it is ordered that the appearance day hereinabove named be, and is hereby extended, so as to include the 27th day of May, 1912.

E. S. FARRINGTON,
Judge. [112]

[Endorsed]: No. 103. In the District Court of the United States, in and for the District of Nevada. In the Matter of Exploration Mercantile Company, a Corporation, Bankrupt, and the Application of P. F. Carney, in Said Proceeding by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court, of Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc. Citation. Filed May 1st, 1912, at 9 o'clock A. M. T. J. Edwards, Clerk. [113]

[Praecipe for Record.]

In the District Court of the United States, in and for the District of Nevada.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, a Bankrupt, and the Application of P. F. Carney, in Said Proceeding by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court, of Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson, and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, under the Writ of Error heretofore perfected in this cause to said Circuit Court, and include in said transcript the following:

The original Petition in Bankruptcy filed against the Exploration Mercantile Company; the Petition for Injunction; the Petition for Stay of Proceedings and for Injunction; Order of Court Staying Proceedings and Return of Service thereon; Order for Injunction; Injunction and Service thereon; Motion to Dissolve the Injunction; Affidavit on Motion to Dissolve Injunction; Order Entered on Hearing Motion to Dissolve Injunction; Demurrer to Original Petition in Bankruptcy; Order Sustaining Demurrer; Answer to

Amend Petition in Bankruptcy, and Demand for a Jury; Verdict of Jury in Bankruptcy; Order Declaring and Adjudging the Exploration Mercantile Company Bankrupt; Motion for Rule to Show Cause Why an Attachment for Contempt Should not Issue; Affidavit of P. F. Carney on Contempt; Order to Show Cause Why Defendants Should not be Adjudged Guilty of Contempt and Service; Answer or Affidavit of H. V. Morehouse to Order to Show Cause on Contempt; Answer or Affidavit of I. S. Thompson to Order [114] to Show Cause on Contempt; Answer or Affidavit of C. E. Wylie on Order to Show Cause for Contempt; Minute Entry of Hearing on Order to Show Cause for Contempt; Decision and Judgment of Court Finding Defendants Guilty of Contempt; Petition for Writ of Error; Assignments of Error; Bond on Writ of Error; Order Allowing Writ of Error; Writ of Error; Original Citation and Service; and this Praecipe.

Said transcript to be prepared as required by law and the rules of this court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and have same on file in the office of the Clerk of said Circuit Court of Appeals at San Francisco before the 17th day of May, A. D. 1912.

H. V. MOREHOUSE,
I. S. THOMPSON,
In Proper Person,
Attorneys for Defendants and Plaintiff in Error, H. V. Morehouse and I. S. Thompson.

[Indorsed]: No. 103. In the District Court of the United States, in and for the District of Nevada. In

the Matter of Exploration Mercantile Company, a Corporation, a Bankrupt. And the Application of P. F. Carney in Said Proceeding by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court, of Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt etc. Praecipe. Filed May 1st, 1912, at 10 o'clock A. M. T. J. Edwards, Clerk. [115]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court of the United States for the District of Nevada.

No. 103.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, a Bankrupt, and the Application of P. F. Carney, in Said Proceeding by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court, of Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson, and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc.

I, T. J. Edwards, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that the foregoing one hundred and fifteen (115) typewritten pages, numbered from 1 to 115, both inclusive, are a true and full copy of the enrolled

pages, and of all proceedings in the matter therein entitled, and that the same together constitute the return to the annexed writ of error.

I further certify that the cost of this record is $148.70, and that the same has been paid by the plaintiffs in error.

Witness my hand and the seal of said court, this 18th day of May, 1912.

[Seal] T. J. EDWARDS,
Clerk. [116]

[Endorsed]: No. 2145. United States Circuit Court of Appeals for the Ninth Circuit. H. V. Morehouse and I. S. Thompson, Plaintiffs in Error, vs. Giant Powder Company, Consolidated, a Corporation, Pacific Hardware and Steel Company, a Corporation, and J. A. Folger & Company, a Corporation, Defendants in Error. In the Matter of Exploration Mercantile Company, a Corporation, Bankrupt. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Nevada.

Filed May 21, 1912.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

H. V. MOREHOUSE and I. S. THOMPSON,
Plaintiffs in Error,

vs.

GIANT POWDER COMPANY, Consolidated, a Corporation. PACIFIC HARDWARE AND STEEL COMPANY, a Corporation, and J. A. FOLGER AND COMPANY, a Corporation,
Defendants in Error.

In the matter of EXPLORATION MERCANTILE COMPANY, a Corporation, Bankrupt.

BRIEF OF PLAINTIFF IN ERROR.

This is a writ of error, prosecuted by these plaintiffs in error, for a judgment of conviction for contempt.

The facts are, that on the 6th day of August, 1908, one Walter C. Stone, a stockholder in the Exploration Mercantile Company, a corporation, under the laws of the State of Nevada, brought an action in the State Court, in due form, against the Exploration Mercantile Company (Trans., p. 64); that these plaintiffs were the attorneys for said Stone. That upon the commencement of said action, process issued, and was served, and said defendant duly appeared in said action, and that one C. E. Wylie, a stockholder and officer of defendant, was appointed receiver of said defendant. That at the time of such action, the defendant was a corporation having a capital stock of 50,000 shares, of which said W. C. Stone owned 48,000 shares, C. E. Wylie 1,000 shares, and Frank G. Hobbs 1,000 shares, so that the whole capital stock was held, owned and possessed by these three men (Trans., p. 101); that

they also constituted the Board of Directors (Trans., p. 101). That they all consented to, acquiesced in, upheld, ratified and confirmed the proceedings in the State Court (Trans., p. 103), and therefore all parties in interest were before the State Court in that proceeding; that said receiver gave due and proper bonds in the sum of $50,000 (Trans., pp. 29 and 51), and thus all creditors were protected from any act of the receiver; the receiver took possession of the estate of the defendant, and these plaintiffs in error acted for said receiver as attorneys, there being no conflicting interests in this litigation. The receiver was in possession from about the 6th day of August, 1908, until after the appointment of a trustee in bankruptcy, which was some time after the adjudication, which was on the 9th of July, 1909, when he turned over the estate.

On the 12th day of September, 1908 (Trans. filing marks, p. 7) these creditors filed an **involuntary** petition in bankruptcy against the corporation, Exploration Mercantile Company. This, as will be seen, was more than one month after the proceedings in the State Court. The only prayer (Trans., p. 6) was for a subpoena, and that the corporation be adjudged a bankrupt.

No bond was given, and no receiver asked, and no proceeding under the bankrupt or any other law taken, to acquire or divest the possession of the estate out of the hands of the State receiver. The estate was mostly a stock of merchandise of great value, and the business was conducted in rented premises, costing $500.00 per month rent. What was to become of this property? Who was to pay rent, and watchmen's fees, insurance, and protect the estate? Now, no stay order or injunction was asked in the petition. But an application was made upon the equity side of the Court for an injunction, in a separate proceeding (Trans. pp. 7, 8 and 9). In this application, the injunction is asked against the **corporation,** and **C. E.**

Wylie, receiver. There is no **averment** of a want of a plain, speedy and adequate remedy at law, or that Wylie or his bondsmen are insolvent.

And this petition for an injunction is not sworn to positively, but only (Trans., p. 10) that petitioner believes. At the same time a petition was filed for a stay of proceedings (Trans., p. 10), and was sworn to upon information and belief (Trans. p. 12). There **was no order** for an injunction, although one was issued by the clerk (Trans. p. 15), and the Court issued a stay order, under his own hand (Trans., p. 20). The injunction was "from further prosecuting said suit in said Court, and from taking any further step or proceeding in said action or suit now pending." (Trans., p. 16.) The restraining order was "to abstain from the sale of, or in any manner whatever disposing of, the property or estate or any part thereof." (Trans., p. 20.) This injunction and restraining order was served upon Stone, president of the corporation, and upon C. E. Wylie, receiver (Trans., p. 21). The restraining order was also an "order to show cause," and the **time** fixed for hearing was the 18th day of September, 1908, at 10 o'clock a. m. (Trans., p. 20), and ran until the "decision of this Court upon the motion." (Trans., p. 20.) Thereupon an affidavit for the dissolution of the injunction and restraining order was made and filed (Trans., p. 26 et seq.). And at the same time a demurrer was filed (Trans., p. 31), which was heard and **sustained** (Trans., p. 36), upon what ground does not appear, but it was sustained, generally. On the day fixed for hearing the motion to dissolve, etc., Sept. 18th, 1908, an appearance was made and a hearing had (Trans., p. 132), and not decided to this day (Trans., p. 127). There was no order made that we know of, or any minute entry, of a continuance for any purpose of the motion to show cause on the 18th day of September, 1908

Thereafter, the only steps taken in the State Court by way of prosecuting the proceedings in that Court, was by

way of **defense**, first, upon a petition filed in that Court by W. P. Fuller & Co., a creditor of the corporation (Trans., pp. 57 and 76), commanding the receiver to do certain things. This was the 26th of January, 1907. What could the receiver do but obey the order of that Court? The next act in the State Court was upon the iniation of these very creditors prosecuting this cause (Trans., pp. 59 and 60). This was the 18th day of March, 1909 (Trans., p. 59). After the proceedings in bankruptcy (Trans., p. 77) these very creditors filed their claims in the State Court, and took steps therein (Trans., pp. 59 and 60). Now, under the proceedings in the State Court, neither the said Stone or the said receiver ever **prosecuted** any step upon their own motion—as provided in said injunction, which read "from taking any further step or proceeding in said action or suit now pending or from further prosecuting said suit in said Court." They initiated nothing.

Now, upon the sustaining of the demurrer, the petitioners amended their petition, and thereupon the corporation filed an answer and issue was made. In the meantime the receiver remained in possession of the estate, having closed the business, and the cause did not come on for trial until the early part of July, 1909.

In the month of December, 1908, the receiver paid these plaintiffs in error the sum of $1,000 for legal advice and assistance (Trans., p. 60), and this allowance was confirmed by the State Court, upon the proceedings taken by these petitioners (Trans., pp. 59 and 60) in that Court. No demand has ever been made upon plaintiffs in error for this money. Also, during this time, and after the injunction and stay order, the receiver paid out certain sums of money as rents (Trans., pp. 130 and 131), which said sums so paid was by the State Court allowed and ordered and confirmed, upon the proceedings in that Court, taken by these petitioners (Trans., pp. 59, 60 and 61).

The cause came on for trial, and on the 9th day of July,

1909, a judgment of adjudication was entered (Trans., p. 42). Thereupon, Mr. P. F. Carney filed his affidavit, upon which an order to show cause (Trans., p. 43) was made upon these plaintiffs in error why they should not be adjudged guilty of contempt of Court in disobeying the said injunction and order to show cause. This order to show cause came on for hearing on the 21st day of July, 1909, and these plaintiffs in error appeared and filed their answers by way of affidavits, which appear on Trans., pp. 45 to 79, and need not be set out here. The matter was heard before the Court, and on the 12th day of April, 1912, two years and eight months after the hearing, these plaintiffs were adjudged guilty.

The affidavit of Mr. Carney has no prayer (Trans., p. 25), and makes no demand for any kind of relief. It is entitled in the civil proceeding (Trans., p .14), and has no title or averments of a criminal character. We therefore set out nothing further by way of a statement of facts, as our brief will deal with facts and law in such manner as to fully cover this cause.

BRIEF OF PLAINTIFFS IN ERROR.

We will not take up our assignments of error in the order in which they are prepared in the transcript, because we think the Court will look into this matter, as to whether the Court, first, had any power in this proceeding to punish criminally; and, second, whether it had any power to punish civilly. That is, whether, upon this affidavit of Mr. Carney, it gave the Court any jurisdiction at all, the contempt, if any, being **constructive,** and not in the view and presence of the Court.

This point is made clearly by the XVII assignment of error. This Hon. Court in Morehouse vs. Pacific Hardware Company, 177 Fed. 337, being this very case, said, "was a **criminal** proceeding," and "a proceeding to punish for contempt committed in violation of an injunction issued in any suit or proceeding is a proceeding entirely distinct

and separate from that in which the injunction was issued." That this proceeding in a Federal Court is **purely a criminal proceeding,** seems to be settled beyond discussion. Being such, the petition upon which the proceeding is based must have a title of its own, and the **charge** and **prayer** must be as specific and precise as the indictment.

In S. Anagyrus vs. Anagyrus & Co., 191 Fed. 208, His Honor, Judge Van Fleet, had occasion to pass upon this very point and question, and his decision is the decision of this case, in behalf of these plaintiffs in error. Judge Van Fleet said, speaking of the petition for contempt in that case, "There is an entire lack of any prayer, demand or suggestion that respondents be punished in any manner." "It is very clearly essential in a proceeding seeking the punishment as for a criminal contempt, and especially should this be so where there is absence of anything else in the pleading to definitely point the nature of the judgment sought." "A criminal contempt is no part of the main case; it is a proceeding independent and apart in the nature of a criminal prosecution, and should have a title of its own, appropriate to indicate its character." Now in the motion for rule to show cause (Trans., p. 13) we find these words, "why an attachment should not issue against them for the disobedience of the orders of the Court." These words, "attached for contempt," are the same in Judge Van Fleet's decision. But in the affidavit of P. F. Carney (Trans., p. 25) there is, as Judge Van Fleet says, "no prayer, demand or suggestion that respondents be punished in any manner." It simply ends, "And further affiant saith not."

Thus we see that this case as held in Morehouse vs. Pac. Hardware Co., 177 Fed. 337, being this very case, is "a **criminal** case," and is "entirely distinct and separate from that in which the injunction was issued," and by Judge Van Fleet, "should have a title of its own," and

Judge Van Fleet quotes from and fortifies his position by the case of

Gompers vs. Buck Stove, etc., 221 U. S. 418.

Now, the title of this proceeding is, by the affidavit of P. F. Carney (Trans., p. 14), "In the matter of Exploration Mercantile Company, a corporation, An Alleged Bankrupt." In the order to show cause (Trans., p. 43), the title is, "In the matter of Exploration Mercantile Company, a corporation, An Alleged Bankrupt." And in the motion for rule to show cause (Trans., p. 13) the title is "In the matter of Exploration Mercantile Company, a corporation, An Alleged Bankrupt." We thus see there is no independent and separate title, no independent and separate proceeding, but is made a part of the original proceeding in bankruptcy.

In Gompers vs. Buck Stove, etc., 221 U. S. 418,

the Supreme Court of the United States said: "In the first place, the petition was not entitled 'United States vs. Samuel Gompers et al,' or 'In re Samuel Gompers et al,' as would have been proper, and, according to some decisions, necessary if the proceedings had been at law for criminal contempt. This is not **mere matter of form,** for manifestly every citizen, however unlearned in the law, by mere inspection of the papers in contempt proceedings, ought to be able to see whether it was instituted for private litigation or for public prosecution, whether it sought to benefit the complainant or vindicate the court's authority. He should not be left in **doubt** as to whether **relief** or punishment was the object in view. He is not only entitled to be informed of the **nature** of the charge against him, but to know that it is a **charge** and not a suit."

And Judge Van Fleet says: "These defects, therefore, partake of the **substance,** and render the moving papers **insufficient** to properly advise the respondents that they were charged with a criminal contempt, and consequently the record affords no sufficient foundation upon which to

base a judgment of a punitory character; and, as that would be the only alternative left to the Court under the facts, it follows that the rule must be discharged, and the proceeding dismissed." This case of Judge Van Fleet is exactly our case. In this, our case, we have no information. We are not asked to **pay** any losses or expenses of these creditors, or any damages, or that they have been to any expense or loss, or were or will be damaged, or that they demand any compensatory relief, or any relief, or that the purpose is to fine or imprison us, or that they want us punished. It must therefore be clear, under these authorities, that the judgment herein is unauthorized, void and beyond the jurisdiction of the Court to make and enter.

But further, the only power of a Federal Court to punish for contempt is Sec. 725, R. S. of U. S., and under that section the Court can only fine or imprison, as a **criminal** offense.

In Kirk vs. Milwaukee, etc., 26 Fed. 501,

the Court said: "Congress having legislated upon the subject of contempt and made a prosecution for contempt a purely **penal** proceeding, with **no provision** for **pecuniary** indemnity to a party injured, this Court, under the restraint of the Federal Statute, cannot enforce the State Statute. Thus the **remedial** character of the proceeding is taken away."

In U. S. vs. A. T. & S. F. Ry. Co., 16 Fed. 853,

it is said: "The power of the United States Courts, in matters of contempt, is limited by Sec. 725, Rev. Stat., to punish by fine and imprisonment. It has **no power** to impose any punishment by way of **damages** or **compensation** to the **plaintiff** in the original action."

In Exparte Robinson, 19 Wall. 512,

the U. S. Supreme Court says: "This enactment (Sec. 725) is a **limitation** upon the manner in which the power may be exercised and must be **held** to be a **negative** of all other **modes** of punishment."

In 16 Fed., **supra,**
the Court said: "This is a proceeding in its nature criminal, and must be **governed** by the strict rules of construction applied to criminal cases. Its purpose **is not** to afford a **remedy** to the party complaining, and who may have been injured by the acts complained of. That remedy must be sought in another way. Its purpose is to vindicate the authority and dignity of the Court. In such a proceeding the Court has **no jurisdiction** to make any order in the nature of further directions for the enforcement of the decree."

Van Zant vs. Argentine M. Co., 2 McCrary, 642.
Haight vs. Lucia, 36 Wis. 355.
N. O. vs. Steamship Co., 20 Wall. 392.
In re Childs, 22 Wall. 163.

Now Section 725, Rev. Stat., says: "And to punish by fine or imprisonment." This is the only mode of punishment and "negatives all other modes." It is therefore plain that a Federal Court is **limited** in contempt proceeding, by the Federal Statute, and can only fine or imprison, and cannot give remedial relief to the complainant. That it cannot indemnify these creditors. Such being the case, the proceeding must be purely criminal, and prosecuted as a criminal proceeding, and this is not a mere matter of form, but of substance. This proceeding is not prosecuted criminally, nor entitled "The United States vs. H. V. Morehouse" or "In re H. V. Morehouse," but is prosecuted in the original cause, and therefore these plaintiffs in error cannot be punished criminally, and the Court had no jurisdiction to indemnify these creditors. The judgment cannot stand. This point, it seems to us, is fatal to these proceedings, and therefore we have discussed it first.

II.

The first assignment of error (Trans., p. 163) had relation to the power of the present U. S. District Court, punishing as for a contempt, either civilly or criminally, an

alleged contempt, charged to have been committed against the old District Court of Nevada. Our contention is, that on January 1st, 1912, by the Act of Congress, entitled "An Act to Codify, Revise and Amend the Laws Relating to the Judiciary," approved March 3rd, 1911, the old District Court of Nevada was abolished, and forever ceased to exist on the 1st day of January, 1912, and that an entirely new District Court came into existence on that day, and that as the acts charged against these plaintiffs in error were all before the 9th day of July, 1909, the contempt, if any, fell with that Court, and that the new District Court has no power to punish these plaintiffs in error, and that the only Court which can punish for contempt is the Court whose order was disobeyed, for the rule is,

Vol. X, Pl. & Prac., p. 1099,

"The same Court which issued the injunction must inflict the punishment for contempt, where the injunction has been disobeyed."

Mr. Rapalje on Contempt, Sec. 13,

says, Sec. 13: "No Court can punish a contempt of another Court, notwithstanding the fact that contempts are regarded as offenses against the State, which, being granted, it would seem to follow that any tribunal having criminal jurisdiction should have power to punish them whenever committed anywhere within the territory over which that jurisdiction extends, yet it is a well-settled rule **that that Court alone** in which a contempt is committed, or whose order or authority is defied, has **power to punish it or entertain** proceedings to that end."

Now it will be seen, by the Act of Congress of March 3rd, 1911, which went into effect January 1st, 1912, that all the Districts Courts of the United States were abolished by the repeal of the Statutes creating them, and a new District Court (Sec. 94 of New Federal Judicial Code), and Sec. 297 (repealing clause) makes the present District Court of Nevada a new Court, and the only question is,

whether Sec. 299 of the new Code kept alive this proceeding, in such manner as to authorize the new District Court to pronounce judgment of conviction, for an offense of contempt, committed not against the new Court, but against a Court which has **ceased to exist.**

The rule we contend for is, that contempt of Court is not against the Judge, but the Court, for, as is said in

People vs. County Judge, 27 Cal. 151,

"The contempt complained was neither a contempt of the County Court, nor of the County Judge, but of the District Court in which the action was pending, and by whose authority, in legal contemplation, the writ of injunction was issued." Now the offense is "contempt of Court," not "contempt of a judge." The Court punishes. If, therefore, the Court has ceased to be, the contempt falls, and is at an end. By Section 297 of this new Federal Code, we read, as having been **repealed,** the following:

"All acts and parts of acts authorizing the appointment of United States Circuit or District Judges, or **creating** or changing judicial circuits or **judicial** districts, or divisions thereof, etc., enacted prior to February First, Nineteen Hundred and Eleven."

This shows a complete repeal of the old Court; and also said Section 297 further says: "Also all other acts, and parts of acts, in so far as they are embraced within and superceded by this act are hereby repealed."

Then the Court against which the contempt proceedings were charged, has ceased to exist. Now, can the new Court punish for an offense not committed against it, but committed against a Court no longer in existence? We claim it cannot.

In Exparte Bradley, 7 Wall. 364,

The U. S. Supreme Court said: "The Supreme Court of the District of Columbia has no **jurisdiction** to disbar an attorney for **contempt** committed before another Court.

Upon reading this case, it will be seen, that an Act

reorganizing the Court of the District of Columbia had taken place in the meantime, as here, and the brief of complainants says: "The Act of March 3rd, 1863, **abolished** both the Circuit and Criminal Courts of the District of Columbia, and **transferred** all their several **powers** and **jurisdiction** to the Supreme Court created to take their place. It prescribes in what manner the Supreme Court shall exercise those powers and jurisdiction. The Supreme Court holds the Criminal Court, and the law makes one Judge the Court for that purpose."

This is the contention which must be set up here. That Act, by Sec. 13 thereof, contains all that is found in Secs. 299 and 300 of the new Federal Code, creating the new Court for Nevada as to trials and continuances of pending suits. But the Supreme Court of the United States holds, "We do not understand the Judges of the Court below as contending that Judge Fisher, at the time of the conduct and words spoken by the relator before him, or in his presence, **was holding the Supreme Court of the District,** but was holding a Court distinct from the Supreme Court that possessed any power or jurisdiction over this contempt as complained of; **otherwise** the case would present the **anomalous proceeding** of one Court **taking cognizance** of an alleged contempt before and against another Court."

This seems to us to be decisive of this case. His Honor, Judge Farrington, sitting in this **new** Court, cannot take the anomalous position of taking cognizance of an alleged contempt committed before and against another Court.

In 9 Cyc. 30

It is said: One Court cannot punish a contempt against another Court or Judge. The offense is substantially criminal, and the power to punish is vested **alone** in the Court whose **judicial** authority is challenged."

In Kirk vs. Milwaukee, 26 Fed. 501,

It is said: "Proceeding a step further, it is a general and

elementary principle, in support of which authorities are not needed, that that Court alone in which a contempt is committed, or whose order or authority is defied, has the power to punish, or entertain proceedings to that end." (Citing Rapalji on Contempt, Sec. 13, 7 Wall. 365; 1 Yates 2, 26 Pa. St. 9.)

Now this last case, **supra,** is certainly to the point, because the proceedings for contempt were commenced in the State Court, and the cause removed to the Federal Court, and the Act authorizing removal authorized the Federal Court to **proceed** therein as if the suit had been **originally** commenced in said Circuit Court, and the **same proceedings** had been taken in said Circuit Court as shall have been had therein in said State Court prior to its removal."

Certainly the Act of Congress of 1911, repealing the old District of Nevada, and creating a new District Court, in Secs. 299 or 300, are no stronger or more efficacious than the Federal removal Act of 1875; and if the contempt on removal could not be punished, certainly the new Nevada Court cannot punish or entertain proceedings to that end, committed not against the new Court, but the old and abolished one. It must be plain that, as contempt of Court under Federal law is a **criminal offense,** that to authorize another Court, **after** the act, and repeal of the law creating the Court against whose authority the alleged contempt is charged to have been committed, would be **ex post facto,** and unconstitutional.

In re Littlefield, 13 Fed. 863,

The Court said: "Clearly one Court cannot punish a contempt against the authority of another. Citing 4 Pet. 108, 27 Cal. 151; 4 Cowan 49, and 1 Yates 2."

From these authorities it must be plain that the new U. S. District Court of Nevada has no authority or power to punish a contempt, which is not against its authority, but against the authority of a Court now not existing.

III.

Assignment V of Errors, we maintain is good and should be sustained, because by Sec. 720, Rev. St. of U. S., no Federal Court can issue an injunction against pending proceedings in a State Court, where the State Court was in possession of property, and had a prior possession and jurisdiction. This statute is absolute, and has only **one** exception, "except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." What law, then, relating to proceedings in bankruptcy have we? Certainly the bankruptcy act itself is insufficient. There must be some provision of the bankrupt law authorizing the injunction and stay order. When we look to the Bankrupt Act, we find only Sec. 11 of that Act, and that only allows a stay upon a **claim** for which a **discharge** would be a release, and Mr. Collier on Bankruptcy, Seventh Edition, p. 209, says:

"This dischargeability of the **debt** is made the **basis of jurisdiction.** There can be **no stay** under this section, unless the suit is **founded** upon a claim from which a discharge would be a release."

His Honor, Judge Farrington, in Trans., pp. 134, 135, says the proceedings in the State Court was "an insolvent act," and then says, "The dissolution of a corporation and the distribution of its assets certainly operate as a discharge of its debts." But that is not the **meaning** or **language** of the bankrupt act. The bankrupt act is speaking of a claim or debt, which can be **presented** by the plaintiff in the suit in the State Court, in the bankruptcy proceedings, and which **claim** would be **discharged,** not in the State Court, but in the bankrupt proceedings. That jurisdiction will attach in the Bankrupt Court upon the filing of the **petition is** not open for discussion—but that the Bankrupt Court will have **jurisdiction,** to issue an **injunction** or **stay order**—is open to question. The proceeding in the State Court may have been an insolvent pro-

ceeding, and yet to **enjoin** that proceeding in bankruptcy proceedings—to stay the State Court, as a Bankrupt Court —the suit must be upon a claim **dischargeable** in **bankruptcy.** Now the suit in the State Court was not upon a **claim** or **debt,** which a **discharge** in bankruptcy would be release. The corporation may be dissolved in the State Court, but the bankrupt law has no reference to the State proceeding, but the bankrupt proceeding. His Honor, Judge Farrington, refers to Hittel vs. District Court, 30 Nev. 382, but as these plaintiffs in error were the attorneys in that case, they certainly know why and upon what ground that case was decided. The **point** in that case was, not that the State Court had **no** jurisdiction, but as that the **order** appointing the receiver was **exparte** and before any kind of service, the **order** was void, because the directors and all persons interested were not made parties. If that case is law, then as the injunction and order **staying** proceedings, were **exparte** in this case, the Federal Court had no jurisdiction of any kind in the premises, so far as the injunction and stay order are concerned. The question in that case was **not** that the Court had **no jurisdiction,** but that the **exparte** order was without jurisdiction. So in Golden vs. District Court, 31 Nev. 250. In both these cases the question was not the jurisdiction of the Court, but the jurisdiction to make **certain** orders against parties not made parties to the proceedings, which said parties appeared in Court, and **objected** to the want of jurisdiction over them. This case presents no such question. The officers of the corporation in this case were the only stockholders and directors (Trans., p. 101). They held all the stock, and constituted the Board of Directors, and (Trans., p. 103) acquiesced in, upheld and ratified and confirmed the said proceedings and application for the appointment of a **receiver.** Thus the right **set forth** in the amended petition for bankruptcy depended upon the **full action** of all parties interested to make the action in the State Court

a **corporate** act. The whole **theory** that the **petition** in the State Court was the action of the **corporation**, was the basis of declaring the act a **corporate act**, under Section 3, sub. div. 4, Bank. Act, "being insolvent applied for a receiver," etc. If the State Court had **no jurisdiction**, it did not **apply for a receiver.** No Court can hold honestly that a **proceeding** in the State Court was a legal and valid proceeding, constituting an **act** of **bankruptcy,** and at the same time hold that the State Court had no **jurisdiction.** If the State Court had no jurisdiction then there **was no proceeding** in the State Court, and this proceeding **utterly fails,** because it is based **solely** upon that proceeding, being an **act of bankruptcy.** For the proceeding in the State Court, to be an act of bankruptcy—the proceeding in the State Court must be a **legal** act, and **jurisdictional.** If **illegal** and **without jurisdiction,** then it was no act and could not be the **foundation** of a bankruptcy proceeding, and this **bankruptcy** proceeding is based **solely** upon the proceeding in the State Court, being in **itself** an **act** of bankruptcy.

It is therefore plain, that to **sustain** the **bankruptcy** proceeding **at all,** or any right in the premises, it must be **admitted** that the State Court **had jurisdiction,** for if the State Court **had no** jurisdiction, then the bankruptcy fails utterly, as it is **founded** upon the proceedings in the State Court, being **an act of bankruptcy,** and if that Court had **no jurisdiction,** its orders and decrees were nullities, and there was **no act of** bankruptcy committed. This is too plain for argument or the citation of authority. It must then be admitted the State Court had **jurisdiction,** and such being the case, the only power of the Court, as a **Court of bankruptcy,** was Sec. 11 of the bankrupt act. True, it could exercise certain **equitable** jurisdiction as a Court of **equity.** Therefore, its jurisdiction, not being found in any special provision of the bankrupt act, its **jurisdiction** is made to depend upon its **powers** as a Court of Equity, and by

Sec. 723, R. S. of U. S.,

"Suits in equity shall not be sustained in either of the Courts of the United States, in any case where a plain, speedy and complete remedy may be had at law."

The petition in bankruptcy sets up no claim or demand or prayer for an injunction or restraining order, and neither Stone, Wylie, Hobbs or these defendants are made parties thereto. The only defendant is a corporation. The only prayer is for a subpoena and adjudication in bankruptcy. Therefore, taking the petition in bankruptcy as a bill in equity, there is nothing upon which to base an injunction or stay order. The petitioners evidently so understood, and for that reason Mr. Kennedy files an **affidavit,** and upon that affidavit, and that **alone,** the restraining order and injunction are issued. But under Sec. 723, R. S., **supra,** the Court's **jurisdiction** to issue such orders **depended** upon the absence of any "plain, speedy and complete remedy at law." If such remedy existed, then the Court **has no jurisdiction** to make orders, because the Federal Statute is prohibitive. It will be seen in Mr. Kennedy's affidavit (Trans., pp. 7 to 9, 11 and 12) that there is no averment of **insolvency,** or the **absence** of a **plain, speedy** and **adequate remedy,** but that C. E. Wylie "qualified, and now is the qualified and acting receiver of the assets," etc., thus showing that Wylie must necessarily be under heavy bonds, to be a receiver of the State Court, and that the petitioning creditors would be freely protected by such bond—but be that as it may, the Bankrupt Act provides in itself a plain, speedy and complete remedy, by

Sec. 69 of the Act.

This section is made specially applicable to **involuntary** petitions. By its very terms, it contains the things and averments set out in the affidavit of Mr. Kennedy. Congress knew that an injustice and wrong had been done persons under the former bankrupt laws, in **involuntary** petitions (In re Ward, 104 Fed. 985; In re Wells, 114 Fed.

222), and owing to the **new law,** fixing a new rule, by defining (Sec. 1, sub. div. 15, Bankrupt Act), "a person shall be deemed **insolvent** within the provisions of this act whenever the aggregate of his property, etc., shall not at a fair valuation be sufficient in amount to pay his debts;" that the alleged bankrupt, upon trial and hearing, might not be a bankrupt at all, and for that reason also, this new law,

Sec. 70, Bankrupt Act,

Makes the **vesting** and **title** of the bankrupt's estate **vest** in the trustee, in **involuntary** proceedings, not upon the filing of the petition, but "as of the date of adjudication." These changes in the law made it necessary to provide some means for the protection of creditors, between the **filing** of the **petition** and the **adjudication,** and also to **protect** the alleged **bankrupt** in case he was not adjudged bankrupt.

Mr. Collier, 7th Ed. Bankruptcy, 807-808, says: "The filing of an involuntary petition does not **ipso facto** take from the alleged bankrupt his dominion over his property; while his disposition of his property may be invalidated and set aside under certain circumstances, such property remains under his control until the adjudication. The remedy of the petitioning creditors in case this freedom of trade is abused, is by the appointment of a receiver under Sec. 2 (3) (15) or an appropriate proceeding under Sec. 3 (e) or Sec. 69."

Thus it is seen that by Sec. 69, Sec. 2 (3) (15), or Sec. 3 (e) of bankrupt act, the petitioning creditors could give bond and have either the marshal or a receiver appointed, and could protect themselves fully. This, then, was by the bankrupt law **itself** a plain, speedy and complete remedy.

In Indian L. & Trust Co. vs. Shanfell, 135 Fed. 484, it is said: "The Constitution and Act of Congress deny the national Court's **jurisdiction** in equity where the complainant has a plain, speedy and complete remedy at law." And also says: "Although this objection to the jurisdic-

tion in equity of a national Court is not made by demurrer, plea or answer, or suggested by counsel, **it is the duty of the Court** of its own motion, and to give it effect."

(Citing 23 Wall. 466 and 19 How. 271.)

It will thus be seen that this case holds squarely that a plain, speedy and complete remedy at law is **jurisdictional,** and that where such remedy exists the Court, as a Court of equity, has no **jurisdiction.** Therefore, the Court had no **jurisdiction** in this case to issue the restraining order or the injunction. **They were and are void.** The violation of **void** orders is not a contempt.

In Hyde vs. Baker, 108 Am. St. 865,
it is said: "Equity **jurisdiction** will not attach where there is a full, complete and adequate remedy at law, even when fraud is alleged."

In Abernathy vs. Oston, 95 Am. St. 774,
it is said: "A suit in equity cannot be maintained where there is a plain, speedy and adequate remedy at law."

In Kiely vs. McGlynn, 21 Wall. 503,
"Equity will not entertain jurisdiction where there is an adequate remedy at law."

In Scott vs. Neily, 140 U. S. 106,
"A suit in equity cannot be sustained in a Federal Court, where there is a plain, adequate and complete remedy at law."

In Oelrichs vs. Fred May, 15 Wall. 211,
The Supreme Court of the U. S. says: "Where there is a complete remedy at law, a bill in equity must be dismissed. This objection is regarded as **jurisdictional,** and may be enforced by the Court **sua sponte,** though not **raised** by the **pleadings,** nor **suggested** by counsel

In Grand Chute vs. Winegor, 15 Wall. 373,
"When full and adequate relief can be obtained in a suit at law, a suit in equity cannot be maintained."

In Littlefield vs. Ballon, 114 U. S. 190,
"A bill which sets up a cause of action on which there is an

adequate remedy at law fails for want of equitable **jurisdiction.**"

That a plain, speedy and complete remedy at law is **jurisdictional** in the Federal Courts, we call attention to

Lawyers' Ed. Digest, Sup. Ct. U. S., Vol. 3, p. 2726,

where several hundred cases are cited to that effect. Therefore, where there is a plain, speedy and complete remedy, provided by the bankrupt law itself, there is **no jurisdiction** to issue either the restraining order or the injunction, and where there is no **jurisdiction** the orders **are void,** for, as is said

In re Ayers, 123 U. S. 443,

"When a Court of the United States undertakes by its **process of contempt** to punish a man for refusing to comply with an order which that Court had no authority to make, the order punishing him for contempt is void." The prisoner was discharged upon **habeas corpus.**

Exparte Fisk, 113 U. S. 713;
Exparte Virginia, 100 U. S. 339;
Exparte Rowland, 104 U. S. 604;
Exparte Paris, 93 U. S. 23;
Exparte Wilson, 114 U. S. 417;
Exparte Carll, 106 U. S. 521;
Exparte Yarbraugh, 110 U. S. 651;
Exparte Sichold, 100 U. S. 343;
Exparte Rowland, 104 U. S. 604.

We therefore earnestly contend that these orders were beyond and in excess of the jurisdiction of the Court, and were therefore void.

IV.

It will appear beyond question that the restraining order and the injunction are issued **only** upon the affidavit of Mr. Kennedy. From that affidavit it will be seen there is **no** averment of the **insolvency** of C. E. Wylie, the receiver of the State Court. He may have been **personally** perfectly responsible in an an action at law for damages.

He was the receiver of the State Court, and the Court had the right to presume that he was under **bonds,** and that such bonds was full and adequate protection to these creditors; and further, while an attorney no doubt can make the affidavit for his clients under the circumstances set out in Mr. Kennedy's affidavit, yet we claim he cannot make such affidavit upon **information** or **belief.** He must verify upon his **own knowledge.** He says (Trans., pp. 9, 10 and 12), "that the statements contained in the foregoing petition are true, **as he believes."** He does not aver **any knowledge** of his own, or that he has **any information.** The question then arises, can this **affidavit** be the **foundation** for any proceeding?

In In re Vastbinder, 126 Fed. 417,

it was held the affidavit should be **positive** and based upon the **knowledge** of the attorney. True, that was a case arising upon the demurrer, and the demurrer was sustained. The sustaining of the demurrer proved the affidavit as insufficient. But in this, our case, there was no **opportunity** for demurrer. The Court acts **exparte.** Did the Court then have **jurisdiction** to act upon an **affidavit** which swears to nothing?

Mr. High on Inj., 3rd Ed., Sec. 1567,

"Nor will it suffice that the material facts constituting the equity on which the injunction is sought are verified by complainant **upon** information and belief; they should be **positively** sworn to.

In Campbell vs. Morrison, 7 Paige 157;

Lawyers' Co-op. Pub. Co., Vol 4 (N. Y. Ch.),

there is a long citation of authorities that such an affidavit is wholly insufficient, and that an injunction should not be granted.

Now the Court finds that on the 18th day of September, 1908, a motion was made to **dissolve,** and that such motion is not yet decided, this decision of the Court being April 12th, 1912, being more than three years and six months,

that such motion to **dissolve** remains in the breast of the Court, and yet **defendants** had done all they could to **show good faith** and **honest purpose** on their part, they being placed in the meantime between **two fires**; the State Court having in the **first instance** statutory and proper jurisdiction, and these **defendants** amenable to its **orders** and **decrees**; and the Federal Court, having jurisdiction also, and these defendants amenable to its orders and decrees. What could these defendants do more than to move to dissolve? If the Federal Court had at once passed upon the motion to **dissolve,** and either **granted** or **refused** the motion, then these defendants could have acted with knowledge. But the Court left them in **doubt** and **uncertainty,** and in the meantime, not upon their own initiation, but upon the **initiation** of (see affidavit of Thompson, Trans., p. 57) W. P. Fuller & Co., a creditor of said alleged bankrupt corporation, Jan. 26th, 1909, the State Court made an order directing and commanding its Receiver Wylie, etc., and these defendants were the attorneys of said receiver. What could Wylie or these defendants do? Had they disobeyed that order, they would be in contempt of the State Court! Now on the 18th day of March, 1909, **these very** creditors (see Thompson's affidavit, Trans., p. 59) go into the State Court and file a motion and notice of motion, thus bringing Wylie, receiver, and these defendants into that Court to act. Again they must obey the State Court or be in contempt. What shall they do? Have they no right of judgment? Mark you, this last **proceeding** in the State Court is the **act of these** petitioning creditors. They are the prosecutors of these defendants. They seek and obtain **the adjudication** of the State Court upon the $1,000.00 fee allowed these defendants, and then ignore their own acts, and **the adjudication** of the State Court, and ask the Federal Court to punish these defendants, and in the meantime, and long **prior thereto,** these defendants have appealed, by a motion to dissolve,

to the Federal Court, so they may be informed how to act, and that Court fails to act, leaving these defendants in the position that they are compelled to act upon their judgment as lawyers, having at least some knowledge of the law; they firmly believe: 1. That the affidavit of Mr. Kennedy was insufficient to warrant an injunction or the issuance of a restraining order; 2. That the cause of the State Court was not based upon a "claim" dischargeable in bankruptcy; 3. That the equitable jurisdiction of the Federal Court could not be invoked **exparte;** 4. That equitable jurisdiction could not be invoked without compliance with Rule 55 in equity; 5. That no **order** being made to continue the motion for an injunction, that it failed to be effective; 6. That under Sec. 719, R. S. of U. S., the order and injunction was at an end; 7. That by virtue of Sec. 20, R. S. of U. S., that although this was a bankrupt proceeding, the Court had no power to issue the stay order and injunction, because this was an **involuntary** proceeding in bankruptcy, and that as the **State Court** already had **jurisdiction,** and was in **possession** of the estate, it would have the right to hold and deal with the same, through its **receiver, until an adjudication** in bankruptcy, and that under the **present** bankrupt law, the **possession** and **control** of the **estate** could not pass into the Federal Court until such **adjudication,** except by the giving of a bond, and the appointment of a receiver in the Federal Court, which was not done, and that these reasons would appeal to the Federal Court, and the Hon. Judge of that Court would **dissolve** his orders, and if he did not, these defendants would not be guilty in obeying the action of the State Court or advising or proceeding therein, under the decision of the Supreme Court of the United States in

Exparte Watts, 190 U. S. 1,

where it is said: "They could not be found **guilty** of **contempt,** because they believed and declared their belief that the State Court had jurisdiction, and the District had not.

Granting that they were mistaken, it does not follow that their mistaken conviction constituted contempt. In point of fact, the State Court agreed with them, and would certainly not have entered orders of whose validity it entertained any reasonable doubt." "In the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interests of his client, he cannot be held liable for error of judgment. The **preservation** of the **independence** of the bar is **too vital** to the due administration of justice to allow of the **application** of any other general rule."

Also: "It has been already assumed that the bankruptcy proceedings operated to suspend the further administration of the insolvent estate in the State Court, **but it remained for the State Court to transfer the assets, settle the accounts of the receiver and close its connection with the matter."**

Here was the clear and plain decision of our highest Court. What was to be done? No bond had been given by the crediors. No Federal receiver had been appointed. No adjudication had taken place. The estate had to be protected. Bills and rent had to be paid. The attorneys were entitled to be paid. And the State Court had the right to adjust these matters **before** turning over the estate to the Federal Court, and yet defendants are found guilty of contempt, when the **creditors** could have had a **receiver,** and the Federal Court could have passed **at once** upon the motion to **dissolve.** Besides, it will be seen by this brief, that the law upon which these defendants relied was not a mistaken belief, but was and is the law. They did not intend any disrespect to the Court, but acted between two fires, and acted upon the law as they understood it and still understand it, and also upon the belief that the Court could not and would not deny the motion to dissolve. We feel we are not in contempt.

V.

Again, where there is a **failure** of either pleading or proofs, there can be no decree. If either is wanting, the decree or judgment is **void.**

Waldron vs. Harong, 102 Am. St. 959;

Twin vs. U. S. Dist. Att'y, 119 Am. St. 354.

The only pleading or proof to give the Court jurisdiction to make the orders in question was the affidavit of Mr. Kennedy. That affidavit is upon **belief,** solely, and Mr.

High on Inj., Sec. 1567, 3d Ed.,

says: "Now will it **suffice,** that the material facts **constituting** the **equity** on which the injunction is sought are **verified** upon **information** and **belief,** but they **must be positively** sworn to." No affidavit of **facts** or **truth** was presented. No **oral or true** facts were before the Court. There was no **proof** of **any kind.** Just the **belief** of Mr. Kennedy.

In Campbell vs. Morrison, 7 Paige, 157,

the Court says: "The **material** facts constituting the only equity upon which the injunction rested were not **verified** in such manner as to authorize the issuance of a general injunction **exparte** to **stay** the defendant from proceeding until a regular answer could be put in. The complainant does not **profess** to **know** any of the facts upon which his application for an injunction is founded."

Here in our case **no fact, material** fact, or otherwise, is sworn to **positively.** The equity of the receiver's solvency or insolvency is not averred; that there is no plain, speedy or complete remedy at law is not averred; the only attempted equity is **irreparable injury,** and the **facts** of how or why or wherein **irreparable injury** would occur is not stated. There is only a **fear** that the goods, wares and merchandise may be dissipated, and thereby an **irreparable** injury be sustained. There is no averment that the receiver of the State Court is not perfectly responsible; that he cannot answer fully in damages; that his acts are

not for the best interests of all the creditors; that he **has no bond**; that the creditors are not fully protected, or that there has been, or will be, any loss.

In Thorn vs. Sweeney, 12 Nev. 251,

Judge Hawley says: "It is **not sufficient** that the complaint alleges that the injury would be irreparable. The plaintiff must **affirmatively** show **how** and **why** it would be so." Now suppose all the facts as set out in the affidavit are true, how could the petitioners be irreparably injured? They must show such **injury** affirmatively. Not leave it open to guess. The loss in the goods, wares and merchandise may be fully protected by the receiver's bond. The new purchases made by him may be of a far **greater value.** They may be decidedly advantageous.

Now, what is an irreparable injury?

Judge Van Fleet, in

Kellogg vs. King, 114 Cal. 378,

says: "An injury is irreparable when it is of such a nature that the injured party cannot be adequately compensated therefor in damages, or when the damages which may result therefrom cannot be measured by any certain pecuniary standard."

What fact is there in this affidavit which shows any such state of things? Not one. The mere averment or use of the word does not suffice. The facts must appear. Why could not the petitioners be **compensated** in damages? We do not know. This Court cannot tell. Why cannot the loss be measured by a **pecuniary** standard? We do not know. This Court cannot tell. When we look, then, at the affidavit, there is **not a fact** or any **proof of anything** to give the Court **jurisdiction** to **exercise** its powers as a Court of equity. There was no **jurisdiction** in the Court to make the orders, for, as is said in

Waldron vs. Harvey, 102 Am. St. 963,

"But there must be jurisdiction of the **matter acted upon** by having it also before the Court in the pleadings." "If

either is wanting the decree or judgment is **void,** not merely voidable or erroneous."

Works on Jurisdiction, p. 30, Sec. 11,

says: "Jurisdiction of the **subject matter** is obtained by the filing of such pleading or **petition** as will bring the action within the **authority** of the Court.

Now this **petition** or **affidavit** contains nothing which brings it **within** the **authority of the Court,** and certainly this is true, when Sec. 723, R. S. of U. S., **prohibits** the Court from entertaining a proceeding in equity, where there is a plain, speedy and complete remedy at law, and the **absence** in the affidavit of any affirmative showing that there is no such remedy is jurisdictional, and the Court had no **power** to make the orders, and **they are void.** It will be observed that by General Orders in Bankruptcy, No. 37, it is provided:

"In proceedings in equity for the purpose of carrying into effect the **provisions** of this Act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be."

It cannot be denied that the issuing of a **restraining order** or any **injunction** is purely a matter in equity.

Now, by Rule 55 in Equity,

Collier on Bankruptcy, 7th Ed., p. 1113,

We read: "But special injunctions shall be granted **only** upon due notice to the other party by the Court in term, or by a judge thereof in vacation, **after a hearing,** which may be **exparte, if the adverse party does not appear** at the time and place ordered."

From this rule, which is laid down by the Supreme Court of the United States, and such rule being law, for, as is said in

Rio Grande, etc., vs. Gildersleeve, 174 U. S. 603,

"A rule of Court has the force of law, and is binding upon the Court, as well as upon the parties to the action."

It is **apparent** the Court could not issue an **injunction,** except **after** a **hearing,** upon an order to show cause. If the party **noticed,** fails to appear, then the **injunction** may issue **exparte,** but **not otherwise.** This rule is **binding** upon the Court. It cannot modify or escape it. It is **jurisdictional.**

Drew vs. Hogan, 26 App. Cas. (D. C.) 55.

Now, when we examine the proceedings herein, we find that the writ of injunction was issued **exparte, without notice, without any hearing,** and so far as the record shows, without even an order therefor; while the rule requires notice, and can **only** be issued upon **due notice,** which of course requires a **time** and **place** to be **fixed,** so that the party can **appear** and **show cause.** The Court, under this rule, which is a **law binding** upon the Court, had **no authority** or **power** to issue the **injunction.** There was, therefore, no **injunction** to be disobeyed, and defendants cannot be in contempt of the **injunction.** This is not a question of **irregularity,** but of **power** and **jurisdiction.**

For, as said by the District Court of Appeals (D. C.), 26 App. Cases 55:

"The original order in this case was granted **exparte,** and the defendant had the right to presume that the Court had obeyed its own rules. Parties to suits and their attorneys are justified in presuming that the Court will not violate its own rules." And in that case the Court held that the judgment for **contempt** was void, because the order of the Court granting an injunction, without bond, **when the rule required a bond,** was a **void order,** because the rule had the force of law, and was **jurisdictional.**

So here, the rule 55 in Equity, **prohibits** an injunction, except **"upon due notice"** and **"after a hearing."** No notice was given; no hearing had. The rule is specific. It is clear, plain and emphatic. The Court therefore had no

power—no jurisdiction to issue an injunction. The injunction was **void.**

And a person is not in contempt for disobeying a **void** order.

Exparte Fisk, 113 U. S. 713;

In re Ayres, 123 U. S. 443.

If, therefore, the injunction was void, the defendant can only be punished for violating the **restraining** order. But the restraining order only **extended** to the 18th day of September, 1908, at 10 o'clock A. M. (Trans., p. 20), and this order shows upon its face that no injunction had been issued, for it says, "the act **sought** to be enjoined," and "against whom an injunction is prayed."

Now, how long does a restraining order last? A restraining order is not an injunction. It fixes its date. If it is not heard on that date, or not kept **alive** by some further order, it ends, for, as Judge Field says, in

Hicks vs. Michel, 15 Calif. 107,

"An order dissolving it, is not necessary. It ends naturally with the motion."

In Exparte Grimes, 94 Pac. R. 668,

no one **appeared** at the **time fixed** in the order, and nothing was done, but parties were held **in contempt** for disobeying the order, after the time fixed for hearing, and they were discharged upon **habeas corpus,** notwithstanding the order provided **"until the further orders of this Court and the judge thereof and the hearing upon said application for a temporary injunction herein."**

In Miles vs. Sheep Rock Mining Co., 49 Pac. 536, the Supreme Court of Utah says: "If upon the **date** so fixed, there is no appearance, and no **continuance** of the hearing of the **motion for** the **injunction,** the restraining order **falls** with the motion. Under such circumstances it requires **no order** of Court to **dissolve** the restraining order. Its life ceased with that of the motion, for such an order is not intended as an **injunction pendente lite,** and is

not an injunction within the meaning of the provision of the Statute above cited."

Now, by Section 718, R. S. of U. S.,

We read: "Whenever **notice** is given **of a motion** for an injunction, etc., the Court or judge thereof may, etc., grant an order restraining the act sought to be enjoined, until the **decision upon the motion."** But the record herein does not show **any motion** for an injunction. It shows a **petition,** asking for an injunction or restraining order, and a restraining order, and also an injunction, a time fixed for a hearing of a motion, but what motion, we are left to conjecture, but **presume** a motion for an injunction; but at the same time of the order, an injunction is issued by the clerk, and by

Sec. 719, R. S. of U. S.,

An injunction issued by a District Judge shall not "continue longer than to the Circuit Court next ensuing, unless ordered by the Circuit Court." This section also provides who may issue injunctions. It limits the issuance of injunctions, 1st, to judges of the Supreme Court; 2nd, judges of the Circuit Court, and 3rd, Judges of the District Court, but only as a judge of the Circuit Court, and when issued by a judge of the District Court it can only run to the Circuit Court next ensuing—because such equity powers do not belong to the District Court as a District Court, and it will be seen by

Sec. 563, R .S. of U. S.,

that the only equity jurisdiction granted the District Courts of the United States is, 1st, to enforce liens in behalf of the U. S. for an internal revenue tax, and, 2nd, to redress rights of persons of **color,** etc. Thus leaving the jurisdiction in **equity** to the Circuit Courts. Therefore, while the District Court could under Sec. 718 of the R. S. of the U. S. issue a **restraining** order for the purpose of **hearing a motion** for a temporary injunction, its action in the premises upon the injunction is not the action of the District Court,

but the action of a District judge sitting as a Circuit judge, and the District judge so acting can only make an injunction or restraining order under Sec. 719 R. S. of U. S., which shall continue to the Circuit Court next ensuing—at which time some proceeding must be had in the Circuit Court, or else the **restraining order** and **injunction** both fall. This seems so plain to us that it cannot be open for argument, for, as is said by Chief Justice Marshall in

Parker vs. Circuit Court, 12 Wheat. 562,

"The act which authorizes District judges to grant writs of injunction provides that the same shall not, unless so ordered by the Circuit Court, continue longer than to the Circuit Court next ensuing." An order for its continuance, therefore, ought to have been made; and after the close of the term without such an order, an execution might have been sued out on the judgment **without any contempt of the Court."**

Now by

Sec. 572, Revised St. of U. S.,

Sec. 120, Desty Fed. Procedure,

the terms for the District Court for Nevada are the first Monday in February, May and October, and by Sec. 121, Desty Federal Procedure (19 U. S. Statute 4), the terms of the Circuit Court for Nevada are the third Monday in March and the first Monday in November. Therefore, the restraining order and injunction could **not continue longer** than the first Monday in November, 1908. As the restraining order and the injunction both were issued September 12th, 1908, they **both expired** on the first Monday in November, 1908, because **no action** of any kind was then taken—no order made—and no injunction or ruling had. And it will be seen by the petition herein and the decree of the Court, that all the **acts charged** to have **been done** by these defendants were **all after** the first Monday in November, 1908, and therefore, under the rul-

ing of Judge Marshall, **supra,** might have been done **"without any contempt of Court."**

Now, the phrase in the restraining order "until the decision of this Court upon the said motion," cannot extend the time beyond "the first Monday in November, 1908," because at that time the power of the District judge ended, and the Circuit Court stepped in, under the Statute, Sec. 719, R. S. U. S., and the motion would **fall** unless some steps were then taken to keep it alive, and nothing was done, and the Court finds in these words, "And said motion has never been decided;" that is to say, the motion of defendants, to dissolve the restraining order and injunction has not been decided, but what became of **petitioner's** motion for **the injunction?** Was that heard? Was that brought up? Was that continued? Was that acted upon? Was any order made in that behalf? Can a Court hold a decision on one motion, and thus constitute action upon some other motion? Certainly the motion of these defendants is not the motion for an injunction. The restraining order is not dealing with a **motion** of the defendants, because that is **not the motion** mentioned in the restraining order, and therefore we ask what became of the motion for the injunction? The taking under advisement a motion to dissolve does not constitute action upon the petitioner's motion, because they have both a restraining order and an injunction, and the two motions do not include the same subject matter, or call for the same action. They say we want an injunction. Upon such motion the Court is called upon to say whether an injunction shall be granted or not. The defendants' motion is based upon a **dissolution** of orders and proceedings **already had**—not something to be done—not a motion to be heard; but to set aside **action** already taken, and therefore taking under **advisement** a motion to dissolve, being **submitted** is not action upon a motion **for** an injunction. What became of that motion?

In San Diego W. Co. vs. Steamship Co., 101 Cal. 216,

the Court held that the words "until the further order of this Court could not prolong the restraining order beyond the pending of the motion for an injunction.

In Hicks vs. Michel, 15 Cal. 107,

the order contained the words, "until the hearing of the whole matter," and the Court said: "The concluding words of the order do not operate to change it into an injunction pending the suit. They only refer to the whole matter on the motion, and not to the whole matter in controversy." So here, "until the decision of this Court upon the **said motion,"** does not refer to any motion, but "said motion," and unless the Court acts upon **"said motion"** it expires on the day fixed, and there is nothing in the record of the Court showing any action upon **"said motion."**

In Miles vs. Sheep Rock M. Co., 49 Pac. 536,

the Court says: "If upon the date so fixed there is no appearance of the parties, and **no continuance** of the hearing of the motion for the **injunction,** the restraining order **falls with the motion."** In our case, an appearance was made, but there **was no continuance of the hearing of the motion for the injunction.** On the contrary, the Court finds "a motion was made (upon the date fixed) to dissolve both of said restraining orders; that said motion (that is, the motion to dissolve) was duly argued by the respective parties and submitted, and that said motion has never been decided (Trans., p. 90)." But not a word is said about **continuing the** restraining order. No order was made as to that. It was then necessarily at an end.

In Exparte Grimes, 94 Pac. 668,

"A restraining order ceases to be operative at the expiration of the time fixed by its terms," and this case is very instructive, because it shows that the phrases "until the further order of the Court," "in the meantime," "until the hearing and decision of the application," all mean the

same thing, and that the order falls of its own force, unless the motion is continued or kept alive in some mode, "although the restraining order provides that it shall be effective until further order." Here, then, the restraining order fell on the 18th day of September, 1908, at 10 o'clock A. M., because no motion was made to continue it, and no order of continuance was made. Now, in

Houghton vs. Courtelyon, 208 U. S. 149,

the Court construes Sec. 718, R. S. of U. S., the same as we do, and that a **restraining** order is not an injunction, and also Rule 55 in Equity as to **notice,** the same as we do, and that decision shows by the quoted opinion of the Court of Appeals of the District of Columbia that the restraining order ended, even though the words "until the further order," etc., was in the order, and says: "When the further order was made **nothing was said of the restraining order.** A new and permanent injunction in favor of the plaintiffs was granted. This decree necessarily superceded the restraining order, and it expired by the limitations contained in its terms."

So here, when the motion of the defendant was submitted, **nothing was said of the restraining order, and the order expired.** We submit, 1st, that as no order was made continuing or speaking of the restraining order, it ceased its force and became nothing on September 18th, 1908; and, 2nd, that if it did not, then it ceased absolutely on the first Monday in November, 1908, because the District Court could only make an order until the beginning of the ensuing term of the Circuit Court, and as nothing was then done, the restraining order and injunction both ended.

But it may be claimed that this was a **bankruptcy** Court, and that the Court had special statutory powers. The answer to that is, that by General Orders in Bankruptcy, No. 37, the Rules in Equity prevail for the "enforcing the rights and remedies" given by the bankrupt act. Therefore if this be a **right** or a **remedy** flowing from

the bankrupt act, that right or remedy must be under Sec. 718, R. S. of U. S., and Rule 55 in Equity.

But it may be claimed that Sec. 11 of the bankrupt law provided for **staying** suits, and the restraining order was made under that section. True, a stay of proceedings may be had, but only those proceedings which are **founded** upon a **claim dischargeable** in bankruptcy.

Mr. Collier, 7th Ed. on Bankruptcy,

says: "(a) Depending on dischargeability of debt. The section under consideration provides for the stay of a suit founded upon a claim from which a discharge would be a release. This dischargeability of the debt is made the **basis** of jurisdiction. There can be no stay under this section unless the suit is founded upon a claim from which a discharge would be a release."

Mackel vs. Rochester, 135 Fed. 904;
In re Cole, 106 Fed. 837;
Tenn. Pro. Co. vs. Grant, 135 Fed. 322;
In re Lawrence, 163 Fed. 131.

We are not arguing that the bankrupt Court cannot punish for contempt for the violation of its **lawful** orders, but we are contending that its orders in this case are **not lawful.** The Court had **no jurisdiction** to make them, and that if it had, both the restraining order and the injunction had spent their **force,** and **ceased** to be **effective,** before any of the **charges** alleged to be a contempt had taken place. We feel **confident** of the accuracy of our position.

VII.

But the law is well settled that an injunction, issued before judgment, **pendente lite, ends** with the judgment, unless **specially** continued. Now the **judgment of adjudication** was entered in this case on the 9th day of July, 1909 (Trans., p. 42), and therefore on that date both the restraining order and injunction fell with the judgment.

Vol. X, Pl. & Prac. 1029,

It is said: "A preliminary injunction is abrogated by

the final decree, and any restraint thereafter desired should be inserted in the final decree."

Mr. Kerr on Inj., 3d Ed., p. 639,

says: "An injunction which has been granted upon an interlocutory is superceded by the judgment in the action. If it is intended that it should remain in force **it must be expressly continued."**

So in

Vol. 16, A. & Eng. Encyc. Law P. 434,

it is said: "An injunction which has been granted upon an interlocutory order is superceded by the judgment in the action. If it is intended that it shall remain in force, it must be **expressly** continued."

People vs. Randall, 73 N. Y. 416.

This therefore raises the question, can the defendants be held as of contempt of an **order** or **injunction, after** the order or injunction has ceased to be effective? The **adjudication** was July 9th, 1909. The injunction and restraining order on that day ceased by the **final decree.** These proceedings were commenced **thereafter,** and the "order to show cause" (Trans., p. 43) required these defendants to appear in Court and show cause on the 21st day of July, 1909, why an attachment for contempt should not issue. Can defendants be punished **for contempt** for some act done while the order was in **force,** but upon proceedings, **after** the order had ceased to be **effective?** Keep in mind that this Hon. Court, in

Morehouse vs. Pac. H. Co., 177 Fed. 337,

held that this **very** proceeding "is a criminal proceeding to punish by fine or imprisonment those who have been guilty of violating an injunction of the Court."

Being therefore a **criminal** proceeding, certainly the rules and laws applicable to criminal proceedings must prevail.

In Ball vs. Tolman, 135 Cal. 375,

the Court says: "The effect of a repeal of a penal statute

is to **prevent any prosecution, trial** or **judgment** for **any offense committed** against it **while it was in force,** unless there is a saving clause in the repealing act."

To the same effect,

Mahoney vs. State, 63 Am. St. 64;

Pensacola, etc., vs. State, 110 Am. St. 67;

Taylor vs. Strayer, 119 A. St. 469.

These authorities are so clear and concise that it is not necessary to cite others. This being, therefore, as the Court has held, a **criminal** proceeding, certainly when the **orders** were ended, the restraint removed, these defendants could not be **prosecuted** "for any offense committed against them while they were in force." The adjudication ended the orders, there being no **"express** orders continuing them." This, it must be remembered, is **constructive contempt,** not contempt in the **presence** of the Court. The claim is, the **violation** of the orders of the Court duly set out in the affidavit of Mr. Carney. When those orders ceased to be orders, like a penal statute, the violation or offense against them fell with the orders, for the offense, like a penal statute, was **against** the orders. If grave and serious crimes, like **murder,** committed while a law is in force, cannot be prosecuted after the law is repealed, certainly a contempt proceeding cannot be maintained after the injunction and restraining order has ceased. It will not do to say that **contempt** is against the **Court,** for the same reason applies to crimes, as a crime is **against the government.**

In Vol. 7, Am. & Eng. Encyc. Law, p. 28,

Criminal contempt is defined: "Generally it may be said that a criminal contempt embraces all acts committed against the majesty of the law, and the primary purpose of their punishment is the **vindication of public authority."**

Also Vol 7, Am. & Eng. Encyc. Law, 29,

it is said: "If the contempt consists in doing a forbidden

act, injurious to the opposite party, the contempt is considered criminal."

In New Orleans vs. Steamship Co., 20 Wall. 387, the Supreme Court of the United States, speaking through Justice Swayne, said: "Contempt is a specific criminal offense. The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were a judgment **upon an indictment** for perjury committed in a deposition at the hearing."

In Fisher vs. Hayes, 6 Fed. 63, the Circuit Court of New York said: "It is well settled that contempt of Court is a specific criminal offense, and that the imposition of a fine for contempt is a judgment in a criminal case."

Now, then, this being a **specific criminal** offense, the rule necessarily applies, which applies to all **criminal cases,** and there being no order or proceeding **continuing** the restraining order or injunction upon the entry of the decree of **adjudication,** the decree abrogated the injunction and restraining order, and these defendants could not be subsequently prosecuted, and the judgment of contempt is **void.**

This was the ruling of the Court in

Moat vs. Halken, 2 Edw. Ch. 189,

where the Court said: "No motion, made after the **dissolution** of such an injunction, for an attachment on the ground of an infringement of it **while in force,** can be sustained."

Peck vs. Yorks, 32 How. Pr. 409.

VIII.

But to show how this cause was presented to the lower Court, we here, under this sub-division, print in full our brief, in that Court. We do this for two purposes. One to show that we presented out case fully; and, two, to show that, basing our conduct upon **good faith,** we had authority supporting our position upon which we had the

right to rely as lawyers, and that even though we should be mistaken in judgment, we cannot be held as guilty of contempt because we saw and construed the law differently from the learned judge of the Federal District Court, or as is held in

In re Watts, 190 U. S. 1,

"They could not be found guilty because they believed and declared their belief that the State Court had jurisdiction, and that the District Court had not. Granting that they were misaken, it does not follow that their mistaken conviction constituted contempt. In point of fact the State Court (as here, Trans., pp. 60-61) agreed with them, and would certainly not have entered orders of whose validity it entertained any reasonable doubt."

And further the Court says: "In the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interest of his clients, he cannot be held liable for error of judgment. The preservation of the independence of the bar is too vital to the due administration of justice to allow of the application of any other general rule." "But it remained for the State Court to transfer the assets, **settle** the accounts of its receiver and **close its connection** with the matter." Thus we see that this decision of the Supreme Court, decided May 18th, 1903, stood as a landmark and guide to the State receiver, the State Court and these plaintiffs in error, and that, although the bankruptcy proceedings may have superceded the State Court, yet the State Court had **the right, before** surrendering and turning over the estate, to **settle** the **accounts** of its receiver, which **account** necessarily **included** the **payment** of his **attorneys,** the rents due, for the building, and such other expenses as his duty commanded him to make. Being the officer of that Court, he had to obey its orders. That Court had the right to "settle his accounts" and "close his connection" with the matter. That Court allowed these

moneys of which complaint is made (Trans., pp. 59, 60 and 61), and upon which this prosecution is based, and such allowance was made upon proceedings taken by these very prosecuting creditors (Trans., p. 59) **after** the bankruptcy proceedings had been commenced. Now the Supreme Court holds that the State Court had this right. Does the exercise of that right make these plaintiffs in error guilty? If this decision of the Supreme Court is law, then these plaintiffs are not guilty. If these plaintiffs fully believed in the decision of the Supreme Court being the law, they acted in good faith. What were they to do? Disobey the orders of the lower Court and be punished there? Have they no rights? Particularly when the Federal Court takes no steps to protect and preserve the property pending an adjudication? When the law grants the corporation the right to deny its insolvency or an act of insolvency, and have the cause tried by a jury, is asserting that right a crime? Or must the corporation, the receiver and these attorneys submit at once, and yield their independence and manhood? Certainly this Court will not hold plaintiffs in error guilty because they differ with the District Court, when many other Courts hold with these attorneys. Since the decision in

Exparte Ward, 190 U. S. 1

the case of In re Zeigler, 189 Fed. 259, has been rendered, upholding our view in that case.

BRIEF OF DEFENDANTS.

a.

We must keep in mind, where was the **possession** of the property of the Exploration Mercantile Company when the **order** was made by this Hon. Court. Was it in the corporation? No, but in the District Court of the State. Being in the District Court of the State, could this Hon. Court **interfere** with that **possession**, simply by an **injunction** or an order to stay issued to persons **not having** the **possession**, and who could not deal with the

property, and who were not **parties** to the bankrupt proceedings?

b.

We must keep in mind that by

Sec. 720, R. S. of U. S.,

no Federal Court, either in an action at law, or a suit in equity, can **enjoin** proceedings in a State Court—here is an absolute prohibition, **except** as to bankruptcy. We must then look to the bankrupt law to find the **grant** of power, to overthrow the **prohibition.** Keep in mind, further, that we are dealing with proceedings **pending** in the State Court, when the bankruptcy proceedings are commenced. This distinction is important, because proceedings in a State Court, **subsequently** to the attaching of jurisdiction in the Federal Court, would be an **interference** with the Federal Court, and could be enjoined—but where the **jurisdiction** was attached in the State Court first—then in **all** cases, other than bankruptcy, the Federal Court **cannot** enjoin by express law.

c.

Look then at the bankrupt law, and

Sec. 11 of that law

says: "A suit founded upon a claim from which a discharge would be a release." Here, then, is the only **grant,** to **stay** proceedings in a State Court. If the suit in the State Court is not upon such a claim, then there is no **grant** of **power** in the bankrupt law, and we are back under the **prohibition** of Sec. 720, R. S. of U. S.

d.

Now, by

Sec. 17, Bankrupt Act,

we find that claims are discharged and released in bankruptcy, and certainly the proceeding in the State Court is not one of those claims.

The law itself, Sec. 1, Bankrupt Act, Sub. Div. 12, defines "Discharge," and says, "Discharge shall mean the

release of a bankrupt from all his debts which are **provable** in bankruptcy." And certainly the suit in the State Court is not upon a "debt" or "claim" **provable** in bankruptcy.

e.

Now, by Sec. 4, Bankrupt Law, a **corporation** cannot become a **voluntary** bankrupt. This is important to be considered, for the reason that when a **voluntary** petition is filed, an adjudication takes place **at once.**

Sec. 18, Bankrupt Law, Sub. Div. "G."

And then, as a matter of course, the Bankrupt Court is at once **vested** with the **estate** of the bankrupt. But in an **involuntary proceeding** the **estate** cannot **vest** in the Bankrupt Court until an **adjudication** for the **involuntary** bankrupt is entitled to his day in Court. He may **deny** his bankruptcy. He is entitled to a trial by jury.

Now by amendment to

Sec. 4, Bankrupt Act of 1903,

there was added these words: "The bankruptcy of a corporation shall not release its officers, directors or stockholders, as such, from any liability under the laws of a State, or Territory, or of the United States."

By Sec. 30, Bankrupt Act,

the rules, forms and orders in bankruptcy are prescribed by the Supreme Court of the U. S., and

Form No. 59,

being the form for the discharge, only **discharges** the bankrupt from all debts and claims made **provable** against his estate. It is apparent then, that the proceeding in the State Court is not **discharged** by reason of bankruptcy.

f.

By Sec. 70, Bankrupt Act, we find the title to the bankrupt's estate vests in the trustee, as of the **date of adjudication.** In a voluntary petition this would be **at once,** but in an **involuntary** petition, not until the hearing, as in this case, not until July 9th, 1909. So that from Sep-

tember 12th, 1908, down to July 9th, 1909, the estate was not **vested** in this Court. The old law was different, making the **vesting** of the **estate, upon** the **filing** of the petition, whether **voluntary** or **involuntary.** But this law makes the **vesting** of the **estate** only upon an **adjudication.** Therefore in an **involuntary** petition, the time between the **filing** of the petition and the **adjudication,** the estate of the bankrupt is **possessed** by the bankrupt, or as in this case in the State Court, and this Hon. Court, has no **possession** or **control** over it for the reason, the estate is not in **custodia legis** until **adjudication.**

To use the language of Mr. Collier,

Collier on Bankruptcy, 6th Ed., p. 588,

"The **filing** of an **involuntary** petition does not **ipso facto** take from the alleged bankrupt his dominion over his property; while his disposition of his property may be invalidated and set aside under certain circumstances, such property remains under his control **until the adjudication.** The **remedy** of the petitioning creditors is by the appointment of a receiver under Sec. 2 (3) (15) or an appropriate proceeding under Sec. 3-2 or Sec. 69."

We thus see that by the bankrupt law, if the creditors wish the **alleged** bankrupt enjoined, they must proceed by

Sec. 69, Bankrupt Act,

as the other sections stated by Mr Collier only relate to the act of the Court in the exercise of the power conferred by the Bankrupt Act, or by

Sec. 3, Sub. Div. e,

in which case a **bond** must be given, as a **condition** precedent to taking **possession** of the **estate. Which was not done in this case.**

It will thus be seen that in **involuntary** proceedings the bankrupt leaves the **estate** of the **alleged** bankrupt free from any **disturbance** from the Bankrupt Court, until **adjudication.** He may carry on his business, buy and sell, pay debts and proceed just as though no petition was

filed against him. Therefore to meet the **probability** that in the meantime the alleged bankrupt might **dispose** of the **estate** or **neglect** it, or that it might deteriorate, the law has **wisely** provided a complete **remedy,** by the creditors giving a bond, to be approved by the Court, a warrant issuing to the Marshal, and a seizure of the estate—then it would be in **custodia legis,** and not till then—**providing,** in this case, it could be taken out of the State Court. When such proceeding has taken place, this Court could of course, in the exercise of its powers as a Court of Equity, issue an injunction or restraining order—but **until** this has been done, the Court has no **jurisdiction** over the estate, and therefore cannot make any **lawful** order in the premises, unless the proceeding in the State Court is upon a claim **provable** and **dischargeable** in bankruptcy.

g.

We must also keep in mind that the **possession** of the **res** being in the State Court, could **not be,** and **was not** in the corporation, the alleged bankrupt, at the time the **order of stay** was made, and that the proceedings herein—that is, the petition originally filed in this Court—the **only** proceeding upon which the **order** in question, together with the affidavit filed at the time, could be made, that Stone, Wylie & Hobbs were not made parties to that proceeding, and were never as individuals served with subpoenas, nor was there any suit pending against **them.** True, as **officers** of the corporation, they were enjoined or could be enjoined by **injunction** process against the corporation—in their **private** capacity as **individuals** there must be some **separate** equitable proceeding, brought against them, because of the **injunction** process of the **Bankrupt** Court—must be something **inhering** in the bankrupt proceeding, independent of its exercise as a Court of Equity. Therefore, **before** Stone, Wylie and Hobbs can be **enjoined** as individuals, they must be made parties by

Sub. Div. 6 of Sec. 2, Bankrupt Act.

They were not made parties. Now, while process of injunction may run against a **party** to a proceeding, his agents, servants and employees, and bind the agents, servants and employees, **although not parties**—the act **against** which they are **enjoined** must be **an act encouraging** or **aiding** the **party** to the **proceeding** to do something **against** the writ of injunction. Now here the **only party** to the proceeding, and the **only** person which could be made a **party** was the corporation defendant.

Mather vs. Coe, 92 Fed. 333,

and the answers of Morehouse, Thompson and Wylie **all** show that the **corporation**—since the order in question—has never **done anything** either as a corporate body, or by any officer, servant or employee, and could not, because of the proceedings in the State Court. That neither Wylie, Stone, Hobbs, Morehouse or Thompson at any time has represented the corporation, since the **order herein,** in any way, in Court or out of Court (except in this Court), and there is no showing to the contrary in any form.

h.

We must keep in mind that Sec. 69 of the Bankrupt Law applied only to the giving of a bond, and authorizing the Marshal to seize and possess himself of the property of the bankrupt, and does not apply here, and was not pursued, and that Sec. 70 of the Bankrupt Act only applied to the trustee, and of course cannot apply until **after** adjudication, and that Sec. (3-e) makes the giving a bond a pre-requisite to the taking of the property of the alleged bankrupt, and has therefore no application here, as no bond was given—and Sec. 2 (15) is but the general expression of the general power of a Court of Equity, and Sec. (11-a) gives the Court power of a **stay** against proceedings in a State Court. These are all the sections dealing with the **possession** of the estate of the bankrupt, or giving power to the Court to act in the premises. Now

the proceeding was under Sec. (11-a), and none other, because Sec. 2 (15) has only relation to "orders," "process" or "judgments," "necessary for the enforcement of **the provisions of this act.**" These orders, proceeds and judgments are only to be made when some **provision** of the Bankrupt Act is being violated, and must, of course, be made in the bankrupt proceeding, such as compelling obedience to the Marshall or referee, or to make reports and inventories, to turn over property to a receiver, etc., or also, in a general exercise of the powers of a Court of Equity, to grant injunctions, upon special pleadings, ancillary to the bankrupt proceedings for the preservation of property, under its powers prescribed by Sec. 23 (23-a) (23-b) and (23-c).

But while it is true that the filing of a petition in voluntary bankrupt proceedings is a **caveat** to all the word, and at once put the property of the bankrupt in **custodia legis,** in the Bankrupt Court, such is not the case under the **present** law as to **involuntary** proceedings, because now the title and possession of the property remains with the alleged bankrupt until an **adjudication,** and does not pass into **custodia legis** until an adjudication, or unless a bond is given and and a receiver is appointed or a warrant issued to the Marshall.

The property therefore in this case was in the custody of the State Court and did not and could not pass into the custody of this Court, until a decree of adjudication.

Such being the case, there was no property interest, subject to the orders or control of this Court, and the only **proceeding** which could be taken in this case, was to stay proceedings in the State Court.

Suppose a bond had been given under Sec. 69, Bankrupt Act, and a warrant has issued to the Marshall, against whom would the warrant run? Manifestly the corporation, defendant, and it only, because against it, and it only, was the **sole party** to the bankrupt proceeding, and it, and

it only, was prayed against for relief, the prayer being (see petition).

Wherefore, petitioners pray that service of this petition, with subpoena, may be made upon Exploration Mercantile Company, a corporation, as provided in the Acts of Congress, relating to bankruptcy, and that it may be adjudged bankrupt, within the purview of said acts." But the Marshall would find **no property** in the possession of the defendant, or its agents, servants or employees. Could he take the property away from the receiver of the State Court? Most assuredly not. But **after adjudication** the property would **vest** in this Court, and the jurisdiction of the State Court would be supplanted—but not till then. Prior to that time any order of this Court would be unavailing because there would be no jurisdiction in this Court to deal with property over which it had no jurisdiction. The only **power** of this Court, then, must be to **stay** the State Court, and such stay can only be granted by the **express** provision of the law to suits founded on a claim dischargeable in bankruptcy.

i.

But for the acts of these defendants, to be a contempt, they must be in violation of **lawful** orders, because Sec. 2 (13) reads:

"Enforce obedience by bankrupts, officers and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment."

Mr. Collier, 7th Ed., p. 34,

says: "The exercise of the power is discretionary, but cannot be invoked in any case unless the order is a **lawful** one."

j.

In all contempt proceedings, being criminal in character, the party can only be held upon evidence beyond a **reasonable doubt.**

Moody vs. Cole, 148 Fed. 295;

In re Switzer, 140 Fed. 976;
In re Adler, 129 Fed. 502;
In re Goldforks, 131 Fed. 643;
American Trust Co. vs. Wallis, 126 Fed. 466;
Boyd vs. Glucklick, 116 Fed. 140.

k.

And a person is not in contempt, when commanded to do something, not in his power to do, and if the order is in relation to property not in his actual possession and control—he is not guilty of contempt.

Boyd vs. Glucklick, 116 Fed. 140;
In re Goldfork B. W., 131 Fed. 643;
Scheover vs. Brown, 130 Fed. 328;
In re Adler, 129 Fed. 902;
In re Gerstel, 123 Fed. 166;
In re Enos, 164 Fed. 749;
In re Rosser, 101 Fed. 462;
In re Wilson, 116 Fed. 419;
In re Meyer, 98 Fed. 839.

Now, all this time from August 6th, 1908, to adjudication herein, neither of the defendants had the control or possession of any property of the defendant, and this Court had no possession, consfructively or actively, and the whole thereof was in the exclusive possession and control of the State Court.

l.

An attorney who in good faith, but wrongfully, advises a State Court, as to the right of such Court to compel a receiver in bankruptcy to surrender property in controversy **cannot** be **adjudged** guilty of **contempt.**

In re Watts, 190 U. S. 1;
In re Zier, 142 Fed. 102.

m.

The advice of counsel and the orders of the State Court protects the receiver, Wylie.

Orr vs. Tribble, 158 Fed. 897.

n.

The defendants' answers cannot be traversed, but must be taken as true.

In re Purvine, 96 Fed. 192;
Boyd vs. Glucklick, 116 Fed. 141.

We will now discuss and amplify the above propositions and specify the authorities sustaining our contention.

a.

The possession of the property was in the State Court at the time the **stay order** was made. This needs no further elucidation. Wylie, Hobbs, Stone, Morehouse and Thompson were not **parties** to the action of bankruptcy. No relief was prayed against them, or subpoenas issued or served, The relief only prayed was,

"Wherefore, your petitioners pray that service of this petition, with a subpoena, may be made upon Exploration Mercantile Company, a corporation, as provided in the Acts of Congress relating to bankruptcy, and that it may be adjudged bankrupt within the purview of said acts." There is no other prayer or relief demanded. The subpoena ran only against the corporation. Not being parties to the suit, they could not be enjoined.

Alwood vs. State, 54 Pac. 1057;
State vs. Miller, 38 Pac. 269;
Exparte Truman, 57 Pac. 223;
Exparte Widber, 91 Cal. 367;
135 Mo. 230.

And, further. Wylie was a receiver of the State Court, and his possession was the possession of that Court, and he and his attorneys and agents cannot be held for contempt in not obeying an order of some other Court. The question is unanswerably settled by

Atwood vs. State, 54 Pac. 1057,

where it is said, in a case of contempt:

"A second and equally conclusive objection to the sentences of conviction is that the act of the appellants was in law the act of the receiver, and the act of the receiver was in law the act of the Court appointing him. The doctrine of comity between Courts will not permit the subjection of a receiver or his agents, or subordinates acting on his behalf, and in his name, to attachment and conviction for contempt of another Court. If a receiver in the execution of his trust runs counter to the jurisdiction or claim of authority of another Court, the forum to which appeal must be made for the correction of his conduct or the punishment of his offense is the Court appointing and controlling him. This for the reason that a receiver is an arm of the Court, exercising not his own authority, but the authority and power of the Court. These principles have been so often decided that they have become settled law of receiverships."

State vs. Miller, 35 Pac. 269.

The rule is, beyond question, that the Court which **first** acquires jurisdiction and possession of the property cannot be disturbed in that possession by another Court, for, as is said in

Murphy vs. John Hoffman Co., 211 U. S. 562,

"Where a Court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby **withdrawn** from the **jurisdiction** of all other **Courts.** The Court having possession of the property has an ancillary jurisdiction to hear and determine all questions respecting the title, possession or control of the property." Also

212 U. S. 118.

There can be no question but the State Court had jurisdiction completely and perfectly, that it took possession of the property, through its receiver, and therefore the property was withdrawn from the jurisdiction of this Court—until the **adjudication.** This Court then had no

authority to make any order effecting the property, until that time, because it had no **jurisdiction** over the property until that time. The possession of the receiver was the possession of the State Court. His acts were those of that Court, and neither the receiver or Hobbs, or Stone, or Morehouse or Thompson did anything outside the receivership or the orders of the State Court. In fact and in law, any **interference** with the receiver would have been a **contempt** of the State Court, for as is said in

Richards vs. People, 81 Ill. 551,

"It is to be remembered that the receiver is the officer of the Court, and that his possession is the possession of the Court, and any unauthorized interference therewith, either by taking forcible possession of the property committed to his charge, or by legal proceedings for that purpose, without the sanction of the Court appointing him, is a direct and immediate contempt of Court, and punishable by attachment."

Therefore Wylie, as receiver, and Morehouse & Thompson, as his attorneys, had to **obey** the **orders** of the State Court. Are they in contempt of this Court for so doing? When this Court has no jurisdiction over the property or business involved until adjudication? Suppose there had been **no** adjudication. Would the orders of this Court be valid? To be **valid** the right and possession of the property must be divested from the State Court. That cannot take place until adjudication. The adjudication vests this Court with possession and control, and divests the State Court. But in the meantime the possession and control of the property and the business is **exclusively** in the State Court, until the **adjudication.** Any order made by this Court **after** adjudication would have to be **obeyed** as against the State Court, but **prior** to that time the **jurisdiction** was in the State Court, and its orders had to be made, for as

Mr. Collier says, 7th Ed., p. 807,

"The filing of an **involuntary** petition does not, **ipso facto**, take from the alleged bankrupt his dominion over his property; while his disposition of his property may be invalidated and set aside under certain circumstances, such property remains under his control until the **adjudication.** The remedy of the petitioning creditors, in case this freedom of trade is abused, is by the appointment of a receiver under Sec. 3-2 or Sec. 69."

We must always keep in mind that the present bankrupt law is not the same as the old laws were—for under **this** law, in involuntary proceedings, there is the **period** between the **filing** of the petition and the **adjudication**—when the estate of the bankrupt is not vested in the Court, and not being in **custodia legis,** the Court has no jurisdiction over it simply by the **filing** of the petition. During that time, if the alleged bankrupt is **actually** in the **possession** of the property, he may do what he pleases with it. If the creditors don't want him to deal or dispose of the property, in the meantime, the bankrupt law has wisely provided them a remedy, to-wit: Sec. 3-e and Sec. 69, both of which compel them to give a bond—because it might happen that he was not in fact bankrupt. The failure to give such bond would make an **order** in the premises void, for the reason that the receiver could not seize property unless there was a bond qualifying him.

In re Haff, 135 Fed. 742.

Now no bond was given in this case. No receiver and the Marshall was not appointed—and so the **estate** was left **outside** of the control of this Court, and, as is said in

In re Oakland Lumber Co., 174 Fed. p. 637,

speaking of the appointment of receiver by the Bankrupt Court:

"What could the Federal receiver do under such circumstances? He has not title to any property. He is a mere custodian. **He could not** take the assets from the

State Court receiver. **The Bankruptcy Court could not make any such order,** and the assets could only be taken from the State Court receiver by an application to the State Court itself."

This is the opinion of the Circuit Court of Appeals of the Second Circuit. If, then, the Bankrupt Court, could not make an order whereby the Marshall or a receiver of such Court could take property out of the possession of the State Court receiver, how can this Court make an order—a lawful order—binding the State Court receiver to obey—or binding his agents and attorneys?

To the same effect are,

In re La Plume Con. Mil. K. Co., 145 Fed. 1013;

American Trust Co. vs. Willis, 126 Fed. 465.

The reason is that the possession of the estate is in the bankrupt and not in the Court, between the filing of the petition and the adjudication, and can only be dealt with by the appointment of a receiver, when in the bankrupt's possession—but when the estate is not in his possession, but that of the State Court, through its receiver, then the Bankrupt Court cannot make **any** order—**valid order**—concerning the estate. Before a **lawful** order can be made one of two things must exist. 1st, the proceedings in the State Court must be upon a claim dischargeable in bankruptcy; or, 2nd, the order must be made **after** adjudicating bankruptcy. If the suit in the State Court **is not** upon a claim dischargeable in bankruptcy, then such action is not effected by the bankrupt law, so far as an injunction or restraining order is concerned, and until an adjudication, the estate of the bankrupt does not pass into the custody of the Bankrupt Court. There is therefore no jurisdiction in the Bankrupt Court to make **any** order. But when adjudication takes place, at **once** the **property** of the bankrupt, independent of the suit in the State Court, vests in the Bankrupt Court. Then, and not till then, does jurisdiction attach, and it attaches to the

estate—but if the **estate** is then not in possession of the bankrupt—the **ownership** of the property would be in the Bankrupt Court, but the possession would not be only the right to the possession—and that right to possession would be **against** the State Court, whose duty it would be to at once, upon proper demand, surrender it to the **trustee** in bankruptcy.

Now up to this time there is no law that we can find giving the Bankrupt Court **power** to make any order, under the circumstances of this case against the receiver or his agents or the State Court or touching or effecting the estate of the bankrupt. Such an order is void and beyond the power of the Bankrupt Court.

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Sec. 720, R. S. of U. S., prohibits beyond question an injunction ordinarily against the State Court. The only **exception** is in bankruptcy. Now, what is that **exception?** There is none other but Sec. 11-a of the Bankruptcy Act. In fact, the petition for the **stay order** and **injunction** is based **solely** upon the proceedings in the State Court and the order of this Court in the injunction is, **"from further prosecuting said suit in said Court, and from taking any further steps or proceedings in said action or suit now pending as aforesaid."** This is the only **order** made by the Court, by way of **injunction**; that is, this was the **writ of injunction.** Also, the Court made **personally** a **stay order,** running against the Exploration Mercantile Company and C. E. Wylie, receiver. Now, notice the **stay order** of this Court reads, **"The said parties against whom the injunction is prayed, be restrained."** The Court's personal order does not **name** the parties, except as above, and therefore we must look to the **petition** for the order to find who the parties are, and the **prayer** of the petition is,

"The premises considered, they pray for an order enjoining and restraining the said Exploration Mercantile Company, a corporation, and C. E. Wylie, receiver as aforesaid."

It will thus be seen that the **stay order** runs only against the corporation, and C. E. Wylie, as **receiver,** of the State Court, "from the sale of, or in any other manner disposing of the property or estate or any part thereof" of the corporation.

While the **injunction** runs **against** W. C. Stone, C. E. Wylie and Exploration Mercantile Company, "from further prosecuting the suit, etc."

In the **stay order Wylie** is stayed, as an **officer** of the State Court, and in the injunction as a **private** individual.

In the **stay order,** Stone and Hobbs are not **included at all.** In the injunction Hobbs is not included, but Stone is, as an **individual.**

Now there **is no evidence** before the Court that Stone ever did anything in the way of **prosecuting** the suit, or that any **steps** were taken by him, or **through** him in that behalf. As to the restraining order, he is **not** included. He therefore has not **violated** either of the orders, as a party thereto, and he can only be held, if at all, as **advising Wylie,** as an **officer** of the State Court.

Hobbs is not in either order, and therefore cannot be held as a **party, enjoined or restrained,** and if held at all, must be **held** as **advising** and **aiding Wylie,** as an **officer** of the State Court.

Thompson and Morehouse are not in either order, and they can only be held, if at all, as **advising** and **aiding** Wylie, as the officer of the State Court.

The only **acts** are those of **Wylie,** as the **officer** of the State Court, so far as the **facts** are proven. Everything he did was under the **orders** and **directions** of the State Court, and in his **capacity** as receiver. All moneys **received** or **paid out** were moneys **received** and **paid** as receiver of the State Court. The **corporation** has done **nothing,** and no **officer of** the corporation has **acted** in any **manner** whatever. No **sales** have been made, but moneys have been

collected and paid out—but only **collected** by the **receiver** of the State Court, as **receiver,** and **paid out** as receiver.

Therefore, we are met with two questions. 1st. Can this Court make a **lawful** order staying proceedings in **this** case, against the State Court? 2nd. Can this Court make a **lawful** order **restraining** and **enjoining** the **receiver** of the State Court? If it **cannot** there is no **contempt.** It it can, the petitioners for the **contempt** proceedings should show **affirmatively** the power and authority for this Court to make such orders.

Now, by Sec. 720, R. S. of U. S., this Court, as an **equity** Court, has no such authority, but is **absolutely** prohibited from so doing. Its power, if any, must be **found specially** conferred by the bankrupt law. Where is that **authority?** Not in Sec. 2 (3) or Sec. 69, because that **course** and **proceedings** was not adopted; not in Sec. 2 (15), because that only refers to the **equity** powers of the Court, or, as is said by

Mr. Collier, 7th Ed., p. 29,

"This is in recognition of the equity powers of the Court and authorizes intervention by the Court, through receivership or otherwise, to preserve the property of the alleged bankrupt;" that is to say, when the Court **has acted** under Sec. 2 (3) or Sec. 69, it may make such orders, issue such process, etc., and can only be exercised upon petition and bond.

Collier, 7th Ed., p. 90.

It will be seen that Sec. 2 (15) means the exercise of the power of the Court in carrying out something done under the provisions of this act, as for instance **after** the appointment of a receiver under Sec. 2 (3), to make such orders, issue such process, etc., as will enable the receiver so appointed to carry out his duties, under the "provisions of the act," and has no reference to **original** orders, but orders made to aid and assist the various officers performing their duties under the act; but if sought for as an

original proceeding, must be iniatiated by proper pleadings and subpoena, on the equity side of the Court, which was not done in this case. But our contention as to the power of this Court to make the **order** in question under Sec. 2 (15), or at all, under the circumstances is squarely sustained and positively passed upon in

In re Ward, 104 Fed. 985.

And as we understand the law, and the judicial decision of the Supreme Court of the United States, this case of **In re Ward, Supra,** is unanswerable. Certainly,

Bardes vs. First Nat. Bank, 178 U. S. 524;

Pickens vs. Roy et al., 187 U. S. 177;

Louisville T. Co. vs. Conninger, 184 U. S. 18,

The reasoning in In re Ward, **supra,** is fully borne out in Louisville Trust Co. vs. Coninger, **supra,** and therefore as all the property of the corporation was in the hands of the State Court, and not in the **possession** of the defendant, this Court would not have jurisdiction to make the order. Besides this last case, 184 U. S., **supra,** holds as does

Mather et al. vs. Coe, 92 Fed. 233,

that, "it would be inadmissable to permit creditors to deprive an assignee of his right to have his claims adjudicated by the proper Court and in the customary mode of proceeding, by the **device** of making him a party to the petition for adjudication and so attempting to bring him into the case for all purposes," and says further, "We think it could not have been the intention of Congress thus to deprive parties claiming property of which they were in possession of the usual processes of the law in defense of their rights." This is the language of the Supreme Court of the United States, and the Court in Mather vs. Coe., **supra,** says: "Hence the special prayer of this petition that W. A. Creech, the **receiver** appointed in the State Court, be enjoined from disposing of the property in his hands, is wholly inadmissable and foreign to the proceedings."

Why, because the **summary** or **plenary** power of this Court cannot be used to deprive the State Court receiver of his day in Court, by regular suit, for as is said in the last case cited, "If **before** the trustee can be appointed, it be **necessary** for the petitioning creditors to take steps to save the property **pendente lite,** and which the contest over the adjudication is pending, that **must be done** by special proceeding in a Court of competent jurisdiction, whether this Court or some other Court, wherein the **adverse holders** are made parties defendant, and given a day in Court to be heard against the proposed seizure. The **Fourteenth Amendment** of the Constitution requires this, as otherwise the seizure could not be "due process of law."

Now certainly if the property cannot be seized by a summary process, and the **receiver** cannot be made a party to the bankrupt proceeding, and a suit must be instituted to give him his day in Court, and his right to defend, and his right to trial by jury, as these authorities hold, it must be true as held in In re Ward, 104 Fed. 985, that a **restraining order** and **injunction** cannot issue against him. This seems plain, logical and unanswerable, and therefore we say that the Court could not make this order, and the same is **unlawful** and beyond the jurisdiction of the Court, unless the Court can make the same under Sec. 11-a, Bankrupt Act.

That section says: "The proceeding in the State Court was not on a claim, debt or demand, dischargeable in bankruptcy (Trans., pp. 30 to 33). The plaintiffs in the State Court had nothing—alleges nothing—sets forth no fact on which he could file any claim, or even participate in any way in the bankruptcy proceeding. And here, the receiver in the State Court, and the plaintiff in the State Court, were not parties to the bankrupt proceedings. That proceeding was wholly against the corporation defendant. The corporation has done nothing under or against the order of injunction.

Power of Bankrupt Court to enjoin or stay proceedings in State Court is fixed by

Section 11, Bankrupt Act.

"A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him."

Notice the word "claim." The law only refers to a claim; that is, a suit or proceeding by a creditor upon a claim provable and dischargeable in bankruptcy.

Notice the word "discharge." Now, "discharge" has a definite and clear meaning in bankruptcy, for Section 17, Bankrupt Act, reads:

"A discharge in bankruptcy shall release a bankrupt from all his provable debts."

Therefore, the bankrupt act only authorizes a stay or injunction against suits founded upon claims by creditors, which claims are provable in bankruptcy, and are discharged by the debtor's release. If the suit is not upon a claim of a creditor, nor upon a provable debt, then the Bankrupt Court is not authorized by the bankrupt law to stay the suit.

Again, notice the word "debts." The law reads, "from all provable debts." If the suit is not based upon a "debt" it can not be discharged in bankruptcy because not within the purview of the bankrupt law.

Or, as is said in

In re Sichold, 105 Fed. 910, at p. 914,

"There is no provision in the present bankrupt law which authorizes or permits the courts in bankruptcy, by the use of summary or plenary process, to stop the proceedings of a State Court in a suit in which it had already, before the institution of the proceedings in bankruptcy, obtained possession of the subject matter and jurisdiction of the parties."

In Tennessee Pr. M. Co. vs. Grant, 135 Fed. 322, sustains our contention fully, that under the circum-

stances of this case the District Court of the United States had no authority or power to issue the injunction herein.

And Mr. Collier says,

Collier on Bankruptcy, p. 142 6th Ed.:

"Cannot be granted against suits founded on provable debts that are not dischargeable."

And on page 143 he says:

"As dependent on dischargeability of debt—this is the very basis of jurisdiction. The suit must be founded upon a claim from which a discharge would be a release."

He also says, on pp. 145 and 146:

"Where a proceeding was commenced long prior to the proceedings in bankruptcy, and the property in controversy was under the control and in the possession of a receiver appointed by the State Court, a bankruptcy court can not enjoin the proceedings."

This is our case. The suit in the State Court was one month and six days before the bankrupt proceedings. The suit was not a claim provable or dischargeable in bankruptcy. The State Court had perfect and complete jurisdiction, both of the subject matter of the action and the person of the defendant. It had full and complete possession of the property through its receiver. Therefore,

Section 720, R. S. of U. S.,

reads: "The writ of injunction shall not be granted by any Court of the United States to stay proceedings in any Court of a state, except in cases where such injunction may be authorized by any law relating to proceedings by bankruptcy."

Now, where is there any authority in the Bankrupt Act? None. The state has jurisdiction. It attached before proceedings in bankruptcy.

So, in Eyster vs. Goff, 91 U. S. 521,

the Court says: "It is a mistake to suppose that the Bankrupt Law avoids, of its own force, all judicial proceedings

in the State or other Courts the instant one of the parties is adjudged a bankrupt. There is nothing in the Act which sanctions such a proposition." "The opinion seems to have been quite prevalent in many quarters at one time, that the moment a man is declared a bankrupt the District Court which has so adjudged draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other Court. This Court has steadily set its face against this view."

Neither of these cases have ever been reversed or modified, and stand today as the decision of the highest judicial tribunal of the nation.

Further, the statute uses as hereinbefore stated (Sec. 11, Bankrupt Act) "which a discharge would be a release." Now, the Bankrupt Act, Sec. 17, says: "A discharge in bankruptcy shall release a bankrupt from all his provable debts." It must be plain, therefore, that this is not a suit that can be stayed at all.

Under the old law a suit against a corporation could not be stayed.

Meyer vs. Aurora Ins. Co., 7 B. R. 191.

Now, Mr. Collier, in his 7th Ed. on Bankruptcy, page 209, says:

"The section under consideration provides for the stay of a suit which is founded upon a claim from which a discharge would be a release. This dischargeability of the debt is made the basis of jurisdiction. There can be no stay under this section unless the suit is founded upon a claim which a discharge would be a release."

From these authorities and the Bankrupt Act, it is apparent that the District Court had no jurisdiction to issue the stay and injunction herein, because the suit in the State Court was not upon a claim dischargeable or provble in bankruptcy." And the following authorities are exactly to the point:

In re Seehold, 105 Fed. 910;
In re N. Y. Tunnel Co., 159 Fed. 588;
In re Bay City, etc., 135 Fed. 850;
In re Haff, 135 Fed. 742;
Vol. XVI Am. & Eng. Cyc. L., p. 417.

And no one will claim the suit was upon a claim **provable** or **dischargeable** in bankruptcy. The order, therefore, staying proceedings and the injunction are not **lawful,** and the parties cannot be held in contempt. The jurisdiction being wanting to make the order at the **time** it was made, the same is void, and there can be no contempt.

124 U. S. 200;
123 U. S. 443;
113 U. S. 713;
104 U. S. 604;
212 U. S. 118.

And the Court must have jurisdiction to make the particular order.

13 U. S. 713.

And as to the jurisdiction of the State Court in the premises one need only read

212 U. S. 118.

We need not cite authorities to show the elementary proposition that a **receiver** is the Court itself—and that the only acts done were those of the receiver acting officially, and not in his individual capacity. Therefore as all acts were done by the **receiver** as receiver, and all **advice** by Thompson and Morehouse were in aid of the receivership and under orders of the State Court, and in good faith, and all moneys received and paid out were received by the receiver as receiver, and paid out as receiver, and nothing done **wilfully,** we submit the defendants should be discharged from the order to show cause.

Keep in mind, our contention is, that no order can be made for injunction, or stay, under the facts in this case.

until **adjudication**—because up to that time the **estate** is in the State Court. After **that,** the property would pass to this Court, but before that **time,** this Court has **no jurisdiction** over the property, the proceeding being involuntary, and the **possession** of the estate not being in the corporation defendant. We respectfully submit the order to show cause herein should be discharged.

GEORGE S. GREEN,
Attorney for Defendants.

I. S. THOMPSON and H. V. MOREHOUSE,
In Propria Persona.

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But could the Court, in an **involuntary** petition in bankruptcy, where the receiver of the State Court is not a party, and where he cannot be made a party, issue an injunction and stay order before an **adjudication** takes place? We deny that the Court can do so. (This point is Assignment VIII of Errors.)

Do we stand alone in this contention? No. Because in

In re Bay City Irrigation Co., 135 Fed. 850;
Mather vs. Coe, 92 Fed. 333;
In re Wells, 114 Fed. 222;
In re Ward, 104 Fed. 985;
Smith vs. Belford, 106 Fed. 658;
Tenn. Prod. Mark. Co. vs. Grant, 135 Fed. 322.

Again,

In re Subold, 105 Fed. 910.

What is the meaning of Sub. Div. "e" of Sec. 3 of the Bankrupt Act, which reads, "And an application is made to take charge of and hold the property of an alleged bankrupt, or any part of the same, **prior to the adjudication** and **pending** a **hearing** on the petition, the petitioner or applicant shall file in the same Court a bond with at least two sufficient sureties, etc.?" Can the petitioners avoid this plain law by doing the same thing by an **injunc-**

tion, and thus take charge of and hold the property so that the receiver of the State Court and the State Court cannot act in the premises? We do not claim that Sub. Div. "e" of Sec. 3, Bankrupt Act, applies only in the sense that the intent of Congress is there, in connection with Sec. 11, Bankrupt Act, and that title does not vest in the trustee until adjudication, to the purpose that in cases of involuntary bankruptcy the possession of the bankrupt's estate does not vest in the Bankrupt Court until adjudication. That in the meantime, where proceedings have taken place in the State Court, before proceedings in bankruptcy, such possession and right to possession cannot be interfered with by the Bankrupt Court, by injunction, because of Section 720 R. S. of U. S.—because the right to injunction must be specially provided for by the Bankrupt Act, and to make the use of an injunction a matter within bankruptcy—then steps must be taken to take the possession of the estate into the custody of the Bankrupt Court. When such steps are taken, and the debtor or the receiver of the State Court is protected by bond, the Federal Court issues its injunction. For that reason Congress has provided the mode by which in involuntary proceedings the possession and right to possession of the estate may vest in the Bankrupt Court. Until that is done, the mere jurisdiction of the bankrupt proceedings does not vest the property in the Bankrupt Court. The difference between voluntary and involuntary proceedings is manifest. In the voluntary proceedings, the debtor transfers ownership, possession and right to possession, at once into the Bankrupt Court. It is his act and deed. In the involuntary proceeding nothing is transferred. No title, possession or right to possession passes to the Bankrupt Court, and may never do so. It all depends upon an adjudication. In the meantime the possession of a state receiver is valid, lawful and proper. This Congress knew, and therefore has provided different from the old law, that the title in the trustee should relate back not to the filing of the petition,

but to the **date** of adjudication. In the voluntary proceeding title passes by the act of the party, but in the involuntary proceeding by operation of law. The one dates from the filing of the petition and the other from adjudication. Knowing this, and intending this, Congress has fully provided that creditors may in the meantime **protect themselves** by giving bond, and taking over the estate, and having a receiver appointed. If they do not do so, then the Bankrupt Court, **as** a Bankrupt Court, cannot enjoin, except where the action in the State Court is upon a claim dischargeable in bankruptcy, and where the claim is not **dischargeable** in bankruptcy, as here, Sec. 720, R. S. of U. S., applies **absolutely,** unless a bond is given, a receiver appointed, and the modes provided by the bankrupt law are carried out. Therefore, the stay order and injunction were beyond the power and jurisdiction of the Court to make and are void.

This is not merely our statement of the law, but

In re Wells, 114 Fed. 222,

Where that Court says, "The Act of 1867 carried with it many evils, real or supposed. One of the evils was its oppressive and expensive features. The estate was eaten up by a most vicious fee system. The litigation was all or practically all in the Federal Courts, generally sitting at a great distance from the debtor, the claimants and the witnesses. **It was the purpose** of the present statute to correct this, and limit the fees and expenses, and have the greater part of the litigation where the parties resided. Under the former statute, the title to all property passed upon the mere filing of the petition. The judiciary committee of the House, in reporting the bill, which became the present statute, **called attention** to this evil, and said that it was corrected by passing the **title** as of the **date** of **adjudication.** And such is the language of the statute. And if this is not so, see what we have: A petition is filed. The debtor can, and often does, **deny** the commission of

the alleged act of bankruptcy. He can demand a trial by jury, and perhaps never be adjudged a bankrupt. This takes months. The petitioning creditors can obtain an injunction and keep the property intact. But in this case the credtors keep quiet and avoid such **expense** and liability. Now, in the meantime, can it be possible that nothing can be done by the debtor or by any other Court? The writ of injunction is denied."

Here we have the plain judicial decision of a Federal Court, fully sustaining our contention, and not only that, but showing the very purpose and **intent** of Congress in making the **title** and **possession,** in **involuntary** proceedings, to **vest** in the Bankrupt Court, only upon **adjudication.** Therefore, the right to an **injunction** and **stay order** can only exist in the Bankrupt Court, in an **involuntary** proceeding, 1st. When the proceeding in the State Court is upon a **claim dischargeable** in bankruptcy, and 2nd. When the petitioning creditors give **due and proper bond,** as a means of protection, and take thereby the estate into the custody of the Federal Court. No bond having been given, and the action of the State Court, not being upon a claim dischargeable in bankruptcy, the injunction and stay order are void and beyond the power of the Court to issue. This seems so clear to us that we cannot imagine how anyone, who will fairly interpret the Bankrupt Act, and free his mind from the glamor of jurisdiction supposed to exist, right or wrong from the law of bankruptcy, and who realizes that the judicial decision under the Act of 1867 is not in this case applicable under the law of 1898, and that the **legal expression** found in the law books and judicial decision, that "the filing of the petition is a caveat to all the world," and in effect an injunction and attachment, is **not true** as to **involuntary** bankruptcy, under the present law, and if found in a case where the proceeding was involuntary, was used mistakenly by the Court, the Court not having in mind the distinction

between voluntary and involuntary bankruptcy, or because the point was not at issue.

Thus we acted. Thus we believed. Thus, when the creditors were not willing, as said by Judge McPherson in **In re Wells, supra,** "But in this case the creditors kept quiet and avoided expense and liability," that these creditors forced upon the State Court and the state receiver to bear the burden of caring for the estate to protect the estate for them, to pay or fight in Court the payment of rents, to employ counsel, take their advice, and yet to be expected that he could not and should not pay such expenses, was to us, and still is to us, beyond belief, that our acts should be inflicted with punishment, when the control, custody and possession of the property had not yet passed into the Federal Court, and could not until **adjudication.** And at the same time the State Court could and did make orders that had to be obeyed, and if not obeyed, then the receiver and these plaintiffs, as his attorneys, were subject to being punished for contempt, and they stood as Judge Greer said in

Peck vs. Jenness, 7 How. (U. S.) 624:

"For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to process for contempt in one if they dared proceed in the other."

Thus we stood. Thus we were situated, and we had before us these decisions, and believed that when the Supreme Court of the United States said in

In re Watts, 190 U. S. 1,

"But it remained for the State Court to transfer the assets, **settle the accounts** of its receiver and **close its connection** with the matter."

If this be the law, and the highest Court of the Nation so says, then these payments were payments which the State Court had the right to allow the state receiver, before turning over the estate, and belonged to that Court, to

settle and pay, and the injunction and stay, under this ruling of the Supreme Court, could not extend to those things which the State Court had the **right** to do, even though enjoined, and even though the bankrupt proceeding "operated to suspend the further administration of the insolvent's estate in the State Court." Such being the case, and thus believing, and thus actuated by perfect good faith and with no wilful purpose, how we can be held guilty of contempt we leave to this Hon. Court, feeling that if the independence of counsel, acting in behalf of clients, and backed by judicial decision sustaining their course, is contempt of Court, then attorneys better know that they have **no** rights, and that they must in all things yield to the opinion of the Judge on the bench, and that any difference of opinion with the Court becomes contempt. We do not believe such is the law or that we should be held guilty, and respectfully submit to this Hon. Court our cause, in the full belief that we shall be found not guilty. We do not think that His Hon. Judge Farrington had any feeling of unkindliness in this matter, but that he has acted from a conscientious conviction of what he believed to be his duty.

Respectfully submitted,

H. V. Morehouse and I. S. Thompson

In Propria Persona.

No. 2145.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

H. V. MOREHOUSE and I. S. THOMPSON,

Plaintiffs in Error,

vs.

THE GIANT POWDER COMPANY, CONSOLIDATED, a Corporation; PACIFIC HARDWARE AND STEEL COMPANY, a Corporation, and J. A. FOLGER AND COMPANY, a Corporation,

Defendants in Error.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation,

Bankrupt.

BRIEF OF DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

W. C. Stone, C. E. Wylie and Frank G. Hobbs were all of the stockholders and directors of the Exploration Mercantile Company, a corporation. They all knew that the corporation was insolvent and agreed

upon a plan to apply to the State Court for a receiver, who should be one of their own number, whereby they proposed to tie the hands of the creditors and themselves control the business and conceal the actual condition. They mutilated the books, allowed themselves fabulous salaries, and in every possible way sought to hinder, delay and defraud the creditors. (Trans., pp. 116, 121-123, 150.)

After the filing of the petition in the Bankruptcy Court, and the issuing and serving of the injunctions, they knowingly, wilfully and contemptuously disobeyed the orders of the Court. (Trans., pp. 91, 92.)

Their attorneys, Morehouse and Thompson, with full notice and knowledge, did wilfully and contemptously advise, induce, aid and abet them in these acts. (Trans., pp. 93, 94.) Wylie, Stone, Morehouse and Thompson were acting together as allies and confederates. (Trans., p. 157.)

Morehouse and Thompson, the plaintiffs in error, appropriated $1000.00, ostensibly as attorneys' fees, in defiance of the order of the Court (Trans., p. 149), and still retain the money. (Trans., p. 151.)

The matter of the alleged petition of W. P. Fuller & Co., mentioned on page 4 of the brief of plaintiffs in error, is but a part of the evidence which cannot be reviewed on writ of error. That petition was also a step taken by plaintiffs in error in furtherance of the scheme to hinder, delay and defraud creditors, and the determination of the trial Court is final.

The further facts appear in the argument.

Plaintiffs in error do not question any ruling as to the admission or rejection of evidence. None of the

evidence is imported into the record. It follows, therefore, that if the pleadings and the judgment are sufficient the action of the lower Court must be affirmed.

> "A writ of error addresses itself to any defect apparent on the face of the record provided the defect be pointed out in the assignment of errors, but the evidence taken in a cause is no part of the record unless, by some method known to the law, it be imported into the record. . . . Whatever the error may be, and in whatever stage of the cause it may have occurred, it must appear in the record, else it cannot be revised in a court of error exercising jurisdiction according to the course of the common law."
>
> *In re Grove,* 180 Fed. 62, 64;
> *Continental Gin Co.* vs. *Murray,* 162 Fed. 873;
> *Fairfield* vs. *U. S.,* 146 Fed. 508.

For convenience the paragraphs of this brief will be numbered to correspond with the numbers of the assignment of errors.

I.

The first assignment of error is that the present District Court of the United States, in and for the District of Nevada, is without jurisdiction because, it is claimed, The Judicial Code abolished the court in which this cause was heard.

But that court was not abolished, nor has it at any time since the beginning of the proceedings in the matter of the Exploration Mercantile Company been deprived of any of its functions or ceased to exist.

"Sec. 294. The provisions of the Act, so far as they are substantially the same as existing statutes, shall be construed as continuations thereof, and not as new enactments, and there shall be no implication of a change of intent by reason of a change of words in such statute, unless such change of intent shall be clearly manifest."

The Judicial Code, Sec. 294; U. S. Stats. at Large, 1909-1911, vol. 36, part 1, p. 1167.

"Sec. 299. The repeal of existing laws, or the amendments thereof, embraced in this Act, shall not affect any act done, or any right accruing or accrued, or any suit or proceeding, including those pending on writ of error, appeal, certificate, or writ of certiorari, in any appellate court referred to or included within, the provisions of this Act, pending at the time of the taking effect of this Act, but all suits and proceedings, and suits and proceedings for causes arising or acts done prior to such date, may be commenced and prosecuted within the same time, and with the same effect, as if said repeal or amendments had not been made."

The Judicial Code, Sec. 299, U. S. Stats. at Large, 1909-1911, vol. 36, part 1, p. 1169.

By The Judicial Code the Circuit Court was abolished and the jurisdiction of that court was transferred to the District Court. The latter tribunal lost none of its powers, but, on the contrary, had jurisdiction of further matters conferred upon it.

The Judicial Code, Secs. 289, 24.

II.

The second alleged error is that the proceedings herein are for criminal contempt, that, therefore, the Court had no jurisdiction to award the fines assessed against the plaintiffs in error as remedial compensation for expenses, costs and attorney's fees for the prosecution of these proceedings; and that, no prayer for relief being incorporated in the motion or affidavit by which the proceedings were called to the attention of the Court, the trial Court had no power to grant such relief.

1. The Bankruptcy Act itself gives full jurisdiction to do all that the District Court of the United States has done in this case.

The filing of the petition in bankruptcy was "a *caveat* to all the world, and, in effect, an attachment and an injunction."

> *Mueller* vs. *Nugent,* 184 U. S. 1, 14;
> *Staunton* vs. *Wooden,* 179 Fed. 61, 62;
> *New York Mfg. Co.* vs. *Cassel,* 201 U. S. 344;
> *Clay* vs. *Waters,* 178 Fed. 385, 394.

It is a criminal offense for any person to receive "any "material amount of property from a bankrupt after "the filing of the petition, with intent to defeat this "Act."

> Bankruptcy Act of 1898, Sec. 29, b, (4).

And the procedure followed in the Bankruptcy Court in this cause is fully warranted.

> Bankruptcy Act of 1898, Sec. 2, (4), (13), (15) and last clause of (19);

In re Swofford Bros. Dry Goods Co., 25 Bankr. Rep. 282, 286, 180 Fed. 549;
In re Hornstein, 122 Fed. 266.

The discussion of the learned trial judge on pages 137 to 148, inclusive, of the Transcript, is worthy of particular attention on this branch of the subject.

2. The distinction between civil and criminal contempts may be important because of the difference in procedure. In a case of criminal contempt review can be had by writ of error only, while appeal is the only method allowed in cases of civil contempt. And if the wrong method is pursued the writ of error or appeal, as the case may be, will be dismissed.

Merchants' Stock & Grain Co. vs. *Board of Trade*, 187 Fed. 398;
Bessette vs. *Conkey Co.*, 194 U. S. 324, 24 Sup. Ct. Rep. 665, 48 Law Ed. 997;
Matter of Christensen Engineering Co., 194 U. S. 458, 24 Sup. Ct. Rep. 729, 48 Law Ed. 1072;
Doyle vs. *London etc.*, 204 U. S. 599, 27 Sup. Ct. Rep. 313, 51 Law Ed. 641;
Ex parte Heller, 214 U. S. 501, 29 Sup. Ct. Rep. 698, 53 Law Ed. 1060;
Webster Coal Co. vs. *Cassatt*, 207 U. S. 181, 28 Sup. Ct. Rep. 108, 52 Law Ed. 160;
Clay vs. *Waters*, 101 C. C. A. 645, 178 Fed. 385.

3. The distinction between civil and criminal contempt may also be important as a matter of substance where, on a hearing for civil contempt, a person is compelled to testify against himself. He cannot then, in

violation of his constitutional right not to be compelled in any criminal case to be a witness against himself, be punished for a criminal contempt.

Gompers vs. *Buck Stove & Range Co.*, 221 U. S. 418, 31 Sup. Ct. Rep. 492, 55 Law Ed. 797;
Kreplik vs. *Couch Patents Co.*, 190 Fed. 565.

4. Where the case is tried as a criminal contempt, and so understood by the parties, and the defendant is ordered imprisoned for ten days, the dominant element is criminal and the sentence is proper. It is also proper to order the defendant, in the same proceeding, to pay a fine of $500.00 for the use of the petitioners.

Kreplik vs. *Couch Patents Co.*, 190 Fed. 565.

And to the same effect see:

Continental Gin Co. vs. *Murray Co.*, 162 Fed. 873.

5. Where the case is tried as a civil contempt, that is, where the remedial element dominates, it is also proper to impose punitive penalty by imprisonment or fine payable to the government, as an incident.

Merchants' Stock & Grain Co. vs. *Board of Trade*, 187 Fed. 398.

The United States Courts have regularly given both remedial and punitive relief for contempt in one and the same proceeding.

Sabin vs. *Fogarty*, 70 Fed. 482, 485;
In re North Bloomfield Gravel Mining Co., 27 Fed. 795;

In re Wilk, 155 Fed. 943;
Cary Manfg. Co. vs. *Acme Flexible Clasp Co.,* 108 Fed. 873, and cases cited.

6. A person charged with contempt is not entitled to a jury trial, and, therefore, the rules regarding indictments are not applicable. The proceeding is summary in character and no particular form of pleadings is required. It is sufficient that by petition, affidavit, motion, or other showing it is made to appear that there has been a wilful violation of the Court's order.

Aaron vs. *United States,* 155 Fed. 833;
In re Fellerman, 149 Fed. 244;
Kreplik vs. *Couch Patents Co.,* 190 Fed. 565;
Hammond Lumber Co. vs. *Union,* 149 Fed. 577;
Employers' Teaming Co. vs. *Teamsters' Joint Council,* 141 Fed. 679.

7. Formal defects in the moving papers in contempt are cured and waived by failure to make objection to their sufficiency and answering on the merits.

Aaron vs. *United States,* 155 Fed. 833;
9 Cyc. 39.

Many of these principles are set forth so clearly in two recent decisions of the Circuit Court of Appeals that it will be well to examine the language of the decisions more fully:

"Let us look at the precise action which is brought before us. The final decree shows that the Circuit Court did three distinct things: First, the court found that the defendant, Samuel Krep-

lik, did violate the injunction of the court; second, the court ordered Samuel Kreplik to pay a fine of $500 to the clerk of the court for the use of the petitioner within 10 days from the date of the decree; third, the court ordered Samuel Kreplik to be imprisoned for 10 days. The court further provided for necessary process to enforce its order.

"It appears, then, that the Circuit Court, provided compensation to the petitioner for the losses it had suffered by reason of Kreplik's act of contempt. This court is not called upon to pass upon the question whether or not the compensation so awarded is excessive. Questions as to the amount of compensation to the petitioner are not properly raised. While the defendant assigned as error that the Circuit Court imposed a fine in the absence of evidence showing the expenses incurred by the petitioner, he did not rely upon such assignment in his exceptions. Thus the question of the reasonableness of compensation is not before us. In *Merchants' Stock & Grain Co.* vs. *Chicago Board of Trade,* 187 Fed. 398, 109 C. C. A. 230, the Circuit Court of the Eighth Circuit has recently considered the question in relation to what matters may be passed upon under a writ of error, and what questions may be reviewed only by appeal.

"The courts of the United States recognize that the process of contempt has two distinct aspects—one criminal, to punish disobedience; and the other remedial and civil to enforce a decree of the court, and to compensate private persons. In *In re Christensen Engineering Co.,* 194 U. S. 458, 24 Sup. Ct. Rep. 729, 48 Law Ed. 1072, it was held by the Supreme Court that, where the fine

for violation of an injunction is to reimburse the party injured by the disobedience, it has not a punitive character; but, where the fine is payable to the United States, it is clearly punitive and in vindication of the authority of the court. *Bessette* vs. *Conkey,* 194 U. S. 324, 24 Sup. Ct. Rep. 665, 48 Law Ed. 997. In *Gompers* vs. *Buck Stove & Range Co.,* 221 U. S. 418, 31 Sup. Ct. Rep. 492, 55 Law Ed. 797, the Supreme Court has lately passed upon this question. The court clearly draws the vital distinction between proceedings for civil contempt, which are between the original parties, and proceedings at law for criminal contempt, which are between the public and the defendant. The court holds that the proper remedial relief for a disobedience of an injunction in the equity cause before it would have been to have imposed a fine for the use of the complainant, measured in some degree by the pecuniary injury caused by the act of disobedience.

. . . . . .

"We have no doubt that the action of the Circuit Court in giving its remedial relief was free from error. The action of the Circuit Court in giving compensation to the petitioner was in our opinion lawful in accordance with the practice of the court in this circuit, and with the rule of the Supreme Court.

"Did the Circuit Court err in ordering the defendant to be imprisoned for 10 days?

"In the Gompers Case the Supreme Court has exhaustively considered the whole subject of contempt. The court there points out that contempts are neither wholly civil nor altogether criminal; and that it is not always easy to classify a particu-

lar act as belonging to either of these two classes. The court there had to determine whether the case before it was one of criminal contempt; and it was compelled to give a critical examination to the pleadings, the procedure, the attitude of the parties to the case, and to all the special facts in the proceeding. The case arose upon an appeal which presented everything in the record. The court found that it was a case of purely civil contempt; but that the court below had undertaken to proceed as in a criminal case, had found guilt, and imposed sentence, without having made it clear to the defendants that they were being tried upon a criminal charge, that the defendants had been forced to testify without knowing that they were being heard upon a charge and not upon a suit. From the special circumstances of the case the court clearly showed that the defendants were not given the protection to which respondents are entitled in a case where guilt or innocence are brought into question and where the liberty of the citizen is involved. The court showed that both parties to the controversy treated the proceeding as purely and solely civil, and not involving a criminal charge. The court clearly pointed out that in a case of doubt the mutual understanding of the parties is of controlling force, and often determines the question of whether the civil or the criminal element dominates the proceeding.

"The case at bar comes before us upon a writ of error, and presents only such questions as arise under the exceptions and are stated in the assignment of errors. This contempt proceeding was distinct and separate from the original equity cause. It arose upon a petition for contempt in which the petitioner stated facts sufficient to bring

before the court both the civil and criminal elements of contempt, and in which the aid of the court was invoked, both to compensate the complainant and also to vindicate its authority. The case clearly shows that the defendant had a fair and full trial on the question of criminal contempt. At the special request of the defendant himself, the Circuit Court ruled that:

" 'This proceeding is a criminal proceeding, reviewable in error; and the rule of evidence as to the proof of the offense beyond a reasonable doubt, including the element of criminal contempt, is applicable'."

"This ruling gave the defendant the clear, specific safeguard of a trial upon a criminal charge. There was a common understanding of all parties that he was having such trial. He has had his day in court at a hearing in which the criminal element dominated the proceeding; and he himself admits that he has been tried and sentenced upon a criminal proceeding, where the rule of evidence as to the proof of the offense beyond a reasonable doubt was made to apply. It is not, then, necessary to critically consider the forms of the proceedings to find out that the defendant had the proper protection to which he was entitled in a case where a criminal charge was made against him. It is true that in the case at bar many of the different forms were present which in the Gompers Case induced the Supreme Court to hold that proceeding to be solely a civil one; but the court was providing for the ample protection of the citizen where a criminal charge was made against him. It was not undertaking to enumerate the different things which must be present in order to make a criminal proceeding. The case

now before us was, in its dominant element, confessedly and unquestionably a criminal proceeding. We are not obliged to examine the mere form to find its character.

"In our opinion the sentence of 10 days imprisonment was properly and lawfully imposed.

"Was it error for the Circuit Court to pass upon both the punitive and remedial elements in one proceeding?

"The Circuit Court imposed a punitive sentence. By its ruling it allowed the criminal element to dominate the proceeding. It also made an award of compensation for the complainant. Of this latter action the defendant complains, and says that it was error for the court to take such action. We have already discussed the award of compensation, standing by itself, and have found it to be free from error. It is our duty now to briefly consider the question presented by the Circuit Court having taken action upon both the punitive and civil aspects of the case in one proceeding, although there may be doubts whether this question fairly arises upon this writ of error.

"In discussing the action of the court upon the criminal side we have found that the mutual understanding of the parties was of great and, perhaps, determining force. Here again, upon the remedial side, the understanding of the parties is of great moment. The record shows that, while the defendant requested the court to rule that the case was a criminal one, the defendant also requested rulings which pertained simply and only to the civil side of the case. It appears then that both parties assumed that, while the civil rights of the parties were involved, the court was asked to proceed further to vindicate its authority. The

Circuit Court made its two awards, its compensatory award and its punitive award, in one proceeding. In doing so it followed the practice of the courts in this circuit and in other circuits. This practice had no less a sanction that that of Judge John Lowell, and of Judge Nelson in *Hendryx* v. *Fitzpatrick,* (C. C.), 19 Fed. 810, 813, where the circuit court in this circuit held that the process of contempt had two distinct functions, one criminal to punish disobedience, and the other civil and remedial; that in patent causes the practice has been to combine the two under a proper proceeding, and to order punishment if it be thought proper, and to indemnify the plaintiff if it is thought proper, or to do both if justice require; that in patent causes it has been usual to embrace the public and the private remedy in one proceeding. This has been held to be the proper practice by Mr. Justice Miller in *In re Chiles,* 22 Wall. 157, 168, 22 Law Ed. 819.

"In the Gompers Case the court has nowhere said that this practice of the several circuits in patent causes is improper or illegal. Under the principles announced in that case it must, of course, appear in a cause in equity that, before imposing a sentence for criminal contempt, the court distinctly gave the defendant his day in court and allowed him a full and fair hearing upon a criminal charge. In that case the Supreme Court recognizes that the practice with reference to contempt proceedings had been unsettled. It does not condemn the practice of the Circuit Court in the several circuits in equity causes in passing upon the punitive and civil aspects of the case in one proceeding. It does, however, hold with great force and clearness that a

citizen should not be compelled to face a criminal charge without being fully advised that he is facing such charge. We do not find that the Supreme Court has ever said that any particular form of proceeding is required, providing the defendant is left in no doubt as to what charge is made against him. . . . There was no necessity for the Circuit Court to delay the administration of justice by dividing the two elements, and insisting upon separate proceedings in each element. If there had been such necessity, the court might have proceeded with the remedial side of the case, and have then granted a motion to show cause at a further hearing why the defendant should not be tried upon the charge for criminal contempt. But in the proceeding before it the Circuit Court found that, upon a proper petition, upon ample notice, and with a full understanding, the parties might properly be heard upon both elements, and it allowed the criminal element to dominate the proceedings. Under the principles of the Gompers case, and under the prevailing practice of this Circuit, we find no error in the action of the Circuit Court."

Kreplik v. *Couch Patents Co.,* 190 Fed. 565,

"The injunction in this case was issued at the instance of the Board of Trade, to protect it from irreparable injury until the final decree could be rendered in the suit. The defendants in the suit, the plaintiffs in error here, must be assumed, for the purpose of the decision of this preliminary question, to have violated this injunction, and to have inflicted serious injury upon the Board while the suit was pending, and the Court fined them

for these unlawful acts, and ordered three-fourths of the fine to be paid to the Board and one-fourth thereof to the United States.

"Counsel for the defendants below argue that this is a judgment for a criminal contempt, because one-fourth of the fines are to be paid to the United States, and because the true line of demarcation between civil contempts and criminal contempts in their opinion was drawn by the Supreme Court of South Dakota in *State* vs. *Knight,* 3 S. D. 509, 514, 54 N. W. 412, 413, 44 Am. St. Rep. 809, and the contempt here in question falls on the criminal side of that line. The Court said:

" 'If the contempt consists in the refusal of a party to do something which he is ordered to do for the benefit or advantage of the opposite party, the process is civil, and he stands committed until he complies with the order. . . . If, on the other hand, the contempt consists in the doing of a forbidden act, injurious to the opposite party, the proceeding is criminal, and conviction is followed by fine or imprisonment, or both; and this is by way of punishment. . . . This rule, as definitely stated, has not been expressly recognized by any case coming under our observation, but it is consistent with all the decisions.' "

"The opinion from which these quotations are made was written in the year 1893. While the line of demarcation there drawn may not have been inconsistent with any opinion coming under the eyes of the Supreme Court of South Dakota at that time, it is inconsistent with the later decisions of the Supreme Court of the United States. In *Ex parte Heller,* 214 U. S. 501, 29 Sup. Ct. Rep. 698, 53 Law Ed. 1060, Heller had been enjoined from using a certain trademark and from stamping

waistbands in a certain manner, and the Court that rendered the decree had adjudged him to be in contempt for violating the injunction, and had fined him $500. He had sued out a writ of error to the Circuit Court of Appeals of the Second Circuit, and that Court had dismissed his writ, on the ground that the contempt was not criminal. Heller had then applied to the Supreme Court for a mandamus to compel the Court of Appeals to take jurisdiction of and to decide his case on the merits of the writ of error, and the Supreme Court dismissed his petition, after quoting from the opinion of the Court of Appeals this declaration:

" 'It is well settled that, when an order imposing a fine for a violation of an injunction is substantially one to reimburse the party injured by the disobedience, it is to be reviewed only by appeal.'

"The truth is that substantial benefit to a private party preponderating over that to the government is the distinguishing characteristic of a civil contempt, and that benefit is often as great and it arises as frequently from judgments for contempts for disobedience of a prohibitory as of a mandatory order or judgment. In view of this fact, and of the decisions of the Supreme Court which have been cited, we adhere to our earlier statement of the nature and of the distinction between criminal and civil contempts which was made in *In re Nevitt,* 54 C. C. A. 622, 632, 117 Fed. 448, 458, was approved by the Supreme Court in *Bessette* vs. *W. B. Conkey Co.,* 194 U. S. 324, 328, 24 Sup. Ct. Rep. 665, 48 Law Ed. 997, and was affirmed by this Court in *Clay* vs. *Waters,* 101 C. C. A. 645, 178 Fed. 385, 389, which reads:

" 'Proceedings for contempts are of two classes

—those prosecuted to preserve the power and vindicate the dignity of the courts and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the Court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce.' " (Citation.)

"The proceedings upon which the defendants below were adjudged to pay their fines were instituted and conducted, not by the government for an affront to the dignity of the court, but by the complainant below, the Board of Trade of Chicago, to protect its property from continuing trespasses, and to save itself from irreparable injury *pendente lite*. They were based on its petition and its counsel presented the evidence in support of it. Neither the United States Attorney, nor any other officers of the government, nor any representative of the people, took any part in the prosecution or had any special interest therein. The purpose of the proceeding was to protect the Board from irreparable injury, and its property, its continuous quotations of the market reports, from continuing trespasses and appropriation by the defendants, by enforcing the injunction which the Court had granted to the complainant for that very purpose. The chief object of the fines was to coerce the defendants to obey the injunction during

the pendency of the suit and to reimburse the complainant for the expenses of its prosecution of the proceedings for contempt.

"It is true that the Court below directed that one-fourth of the fine should be paid to the government and that the Supreme Court held, in *Matter of Christensen Engineering Co.*, 194 U. S. 458, 461, 24 Sup. Ct. Rep. 729, 48 Law Ed. 1072, where one-half of the fine was payable to the United States, that the punitive element dominated the proceeding in that case, and made the complaint criminal and not civil. But in the case at bar the punitive element was incidental, and the civil purpose to protect the property of complainant was the only real object of the proceeding. The Court below never estimated an affront to its dignity and a defiance of its power at one-third of the expense of the proceedings or of the value of complainant's property taken in violation of the injunction. It ordered three-fourths of the fine paid to the complainant and one-fourth to the government for the single dominant object of the proceedings, for the purpose of protecting and preserving the complainant's property and coercing the complainant to obey its injunction that this purpose might be accomplished.

"In every civil as well as in every criminal contempt there necessarily inheres an affront to the dignity and a defiance of the power of the Court and a liability to punishment therefor. The liability to punishment for an affront to the dignity of the Court cannot, therefore, distinguish a civil from a criminal contempt, for it always exists in each. Yet every contempt is either a civil contempt or a criminal contempt. What, then, is the distinguishing characteristic between them? It is

> the dominating object of the prosecution and the party chiefly interested therein. If the chief purpose of the proceeding for contempt is to enforce the rights and administer the remedy to which courts have adjudged or may adjudge a private party to be entitled, and if such a private party is the one chiefly interested in it, the proceeding is for a civil contempt. If the chief object of the prosecution, as in cases of misconduct in court, or disobedience of a subpoena, is, by punishment of the offender to preserve the power and vindicate the dignity of the Court, and if the party chiefly interested in the prosecution is the government or the public, the proceeding is for a criminal contempt."
>
> *Merchants' Stock & Grain Co.* vs. *Board of Trade,* 187 Fed. 398.

In the case at bar the moving papers stated facts sufficient to bring before the Court acts constituting both civil and criminal contempt. No objections were made to the form of those papers. The sworn answers admit all the material allegations and show that, under an alleged misconception of the law, the plaintiffs in error, while claiming to have the "highest and sincerest regard for the Judge of this Hon. Court, and the greatest respect for the Court over which he presides," nevertheless deliberately and intentionally disobeyed its lawful orders. There is, and can be, no question as to the evidence. *Fairfield* vs. *United States,* 146 Fed. 508. The Court in fining them for contempt in violating the order restraining C. E. Wylie from disposing of any of the property of the Exploration Mercantile Com-

pany directed a repayment of the money which was shown to have been taken in violation of the order.

In the Gompers case, *supra,* it is expressly held that the civil case out of which the contempt grew, including the matter involved in the contempt proceeding so far as the parties were concerned, had been fully compromised and settled, and, therefore, the Court could not make any order of a remedial nature as for a civil contempt. It is stated, however, that if there had been no settlement the Court would have made its order in accordance with the facts found and vindicate its authority. As it could not do so the cause was dismissed without prejudice to a proper proceeding for criminal contempt.

In the case at bar there is no such condition, and the payment of the fines as provided in the order will only partly recoup the damages suffered by reason of the contemptuous acts established.

The form of prayer in the moving papers is complained of for the first time in this Court.

The motion shows that the parties charged were required to show cause why an attachment for contempt should not issue against them for disobedience of the orders of the Court; the order to show cause directed them to show cause why they should not be adjudged guilty of contempt for disobedience of the lawful orders of the Court; and the affidavit served with these papers shows specifically what were the contemptuous acts. This is sufficient under the rule as to the requirements of pleading in contempt.

See authorities cited under paragraph II, subdivisions 6 and 7, *supra.*

In a doubtful case, as was done in the Gompers case, the prayer may be looked to in determining whether the proceedings be for civil or criminal contempt; but it cannot be jurisdictional where the party has not been misled and has had his day in court, and has made no objection in the trial court.

In the case of *S. Anargyros* vs. *Anargyros Co.,* 191 Fed. 208, there was a disobedience of an injunction, which, on appeal, had been held improperly issued; that is, the order granting the injunction had been reversed when the contempt matter came before the Court. No remedial relief could, therefore, be granted. The moving papers were apparently attacked before the trial court and were held insufficient, in the absence of anything else in the pleading to show that a criminal contempt was intended. The trial court in the opinion says:

> "Furthermore, there is an entire lack of any prayer, demand or suggestion that respondents be punished in any manner. While *such specific demand is perhaps not essential to enable the Court to afford relief of a private and remedial character appropriate to the facts,* it is very clearly essential in a proceeding seeking the punishment of a respondent as for a criminal contempt; and especially should this be so where there is an absence of anything else in the pleading to definitely point the nature of the judgment sought."

The prayer is therefore sufficient in the case at bar. The moving papers were in the usual form as indicated by Loveland on Bankruptcy (3rd ed.), forms, Nos. 115, 116 and 117, p. 1111 *et seq.*

This is a case of civil contempt.

Following the argument of the Gompers case, it appears:

The dominating part of the punishment is remedial and not punitive;

The proceedings are between the parties to the bankruptcy matter;

The papers are entitled in the bankruptcy matter and not the United States against the persons charged;

The petitioning creditors were the actual and nominal parties on the one side and the persons charged on the other;

The case was treated as a part of the bankruptcy proceeding;

Stipulations were made by the parties;

The petitioning creditors have been the sole parties in opposition to the persons charged with contempt, and their counsel, in their names, have filed briefs and made arguments; and,

The record and evidence in the bankruptcy case were offered in evidence in the contempt trial.

Furthermore, the plaintiffs in error, after the trial of the contempt matter submitted a brief and argued to the trial court that, "Here the charge against us is prosecuted as a civil contempt." And this, it must be remembered, was after the decision had been handed down in the case of *Morehouse* vs. *Pacific Hardware & Steel Co.*, 177 Fed. 337. What is there said with reference to this being a criminal contempt is not the law of the case, for several reasons:

First. The facts have materially changed by reason of the filing of the answers and the acts and understanding of the parties; and,

Second. The remark was not material to the decision of the case. The ground of the decision was that the matter complained of was not reviewable until the petitioners shall have been adjudged guilty of contempt in the court below; and that the order to show cause was but process. Nor was it necessary to sustain the argument for the court to have gone further than to say that the proceeding was for an affront to the dignity of the court, without determining whether it was civil or criminal contempt.

> "A proposition once decided" (is the law of the case) "only when the facts properly controlling its decisions on the subsequent appeal or writ of error are substantially the same as before."
>
> *Brown* vs. *Lanyon Zinc Co.*, 179 Fed. 309;
> *Crotty* vs. *Chicago, etc.*, 169 Fed. 593.

> "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which these opinions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for discussion."
>
> Chief Justice Marshall in *Cohen* vs. *Virginia*, 6 Wheaton, 399.

> "We recognize that what was decided in a case pending before us on appeal is not open to reconsideration in the same case on a second appeal upon similar facts. The first decision is the law

of the case, and must control its disposition; but the rule does not apply to expressions of opinion on matters, the disposition of which was not required for the decision."

Barney vs. *Winona,* 117 U. S. 228, 231, 6 Sup. Ct. Rep. 654, 29 Law Ed. 858.

When the case was here before, moreover, there was not a word said in the briefs, or on oral argument, upon the question.

It therefore appears that this is a civil contempt, and, not being reviewable by writ of error, the proceeding in this court must be dismissed.

Merchants' Stock & Grain Co. vs. *Board of Trade,* 187 Fed. 398, and cases cited.

III.

The third alleged error assigned is that the District Court had no power or authority to issue the injunction for the reason that the property of the bankrupt was then in the possession of the state court, and not of the bankrupt, that the issue of bankruptcy had not been determined and the plaintiffs in error were never made parties to the bankruptcy proceeding.

If an injunction is absolutely void, as where the court is without jurisdiction to grant it, a violation thereof is not contempt. But that is not the case here. On the contrary the injunction was in all respects proper.

Where, however, the court had jurisdiction, the fact that an order of injunction is merely erroneous, or was

improvidently granted or irregularly obtained, is no excuse for violating it.

22 Cyc. 1009, and authorities cited in note 82.

The Federal Court as a Court of Bankruptcy, not only has the power and jurisdiction, but will restrain every proceeding in a state court which would defeat the Bankruptcy Act.

In re Hornstein, 122 Fed. 266, 271;
In re Knight, 125 Fed. 35;
Loveland on Bankruptcy (3rd ed.) p. 111;
Remington on Bankruptcy, Vol. 1, Secs. 1602, 1605;
In re Brown, 91 Fed. 358.

The provisions of the Act of Bankruptcy would be defeated by allowing the bankrupt to select his own trustee to administer upon his estate, instead of his creditors; and the power granted to Congress, "To establish an uniform Rule of Naturalization, and Uniform Laws on the subject of Bankruptcies throughout the United States," Const. U. S., Art. 1, Sec. 8, Sub. 4, would be effectually destroyed by allowing the state court to take jurisdiction of the estate of the bankrupt, and administer and distribute it.

In re John A. Ethridge Furniture Co., 92 Fed. 329, 332.

That Messrs. Stone, Wylie and Hobbs did so attempt to evade the provisions of the Bankruptcy Act is clearly shown from the opinion of the District Court, Transcript, pages 116 to 123, inclusive, a part of which reads as follows:

"The evidence is very conclusive that each of the three men knew the business was running behind, and wished to conceal that fact. When the creditors were about to commence attachment suits, Mr. Stone, who had received the $48,000.00 credit, who had mutilated the journal, who had withheld his own account from examination, who was then the actual owner of 96 per cent of the stock of the concern, filed in the state court a petition asking that court to wind up the corporation, and place its property in the hands of a receiver because litigation was threatened and the assets were likely to be wasted. Mr. Wylie, general manager of the corporation, immediately appeared in court and filed an admission of service for the corporation, and a request that he himself be appointed receiver. This proceeding in the state court was certainly in harmony with the previous and subsequent conduct of the three men; it was but a part of a scheme to hinder and delay and therefore defraud the creditors of the Exploration Mercantile Company, and the scheme was participated in, and consistently pushed and carried out by all the officers of the corporation, by its president, secretary and treasurer, general manager and directors, and by all its stockholders.

"It is alleged, and the testimony shows, that all the directors, officers and stockholders of the Exploration Mercantile Company, as the act and deed of the corporation, caused the Stone petition to be filed and a receiver to be asked for, and later that they, in behalf of said corporation, as its act and deed, moved the court for an order appointing Wylie receiver. It is also averred that the corporation ratified the act. It is also alleged, and amply proven by the testimony, that this was all done to

hinder, delay and defraud its creditors; and it is clear from the testimony that these persons, Stone, Wylie and Hobbs, knew the corporation was insolvent at the time the receiver was applied for. Under the shelter of a receivership, which tied the hands of the creditors, they proposed themselves to control its business and conceal its actual condition."

Transcript, pp. 121, 122 and 123.
See also opinion in Contempt, Trans., p. 136.

Messrs. Morehouse and Thompson at all times knowingly, wilfully and contemptuously counseled, advised, induced, aided and abetted these men in their violation of the order of the District Court of the United States. They were confederates.

Transcript, pp. 93, 94, 95, 137, 157.

These facts on writ of error may not now be disputed.

In re Grove, 180 Fed. 62, 64.

The bankrupt law is paramount to all the state insolvent laws, and where the effect of enforcing the state law is to defeat the object and provisions of the Bankrupt Act, that part of the state law must yield to the provisions of the latter.

Cresson & Clearfield Coal & Coke Co. vs. *Stauffer,* 148 Fed. 981;
1 Remington Bankruptcy, Secs. 1603, 1634;
U. S. Rev. St. Sec. 711, 4 Fed. Stat. Ann. 493, 497;

Bankruptcy Act., Sec. 2, Sub. (7) and (15); (4), (13) and (16).
Opinion, Transcript, 133 to 148, and cases cited.

Furthermore, the order of the state court dissolving the corporation and appointing Mr. Wylie receiver, was void, because all the directors were not joined as parties to the proceeding, and thus no jurisdiction had been obtained "over the natural persons interested in the subject matter of the orders at the time they were made."

Hettel vs. *District Court,* 30 Nev. 382, 96 Pac. 1062;
Golden vs. *District Court,* 31 Nev. 250, 101 Pac. 1021.

The order dissolving the corporation and appointing a receiver being void, Mr. Wylie was but a bailee for the Exploration Mercantile Company; his possession was not a case of "adverse possession, or the possession in enforcement of pre-existing liens;" he, Stone and Hobbs were still officers of the corporation. Mr. Morehouse and Mr. Thompson were their attorneys.

Opinion, Transcript, p. 137.

The remaining point in the third assignment of alleged error is completely answered in the opinion of the Hon. Judge of the trial Court, beginning on page 151 of the transcript in the following language:

> "It is objected that respondents were not, and could not have been, made parties to the original bankruptcy proceedings; therefore the court had no jurisdiction over them, and they could not be

enjoined at all. It is sufficient to say that under section 2 (15) quoted above, the bankruptcy court has power between the filing of the petition and adjudication, as well as afterward, to enjoin persons within its jurisdiction, whether parties to the bankruptcy proceeding or not, from making any transfer or disposition of any part of the debtor's property, or from doing any other thing which will interfere with the administration of the Bankruptcy Act. The petition for such an injunction should be filed and the injunction issued in the bankruptcy proceeding itself. 1 Remington on Bankruptcy, Secs. 359, 361; *In re Jersey Island Packing Co.,* 138 Fed. 265; *In re Globe Cycle Works,* 2 Am. Bank Rep. 447.

"Section 2 (13) of the Bankruptcy Act supplies the Court with authority to enforce obedience to its lawful orders, not only from bankrupts, but also from other persons.

"In *Boyd* vs. *Glucklich,* 116 Fed. 135, the Court declares that 'any act, matter, or thing which any United States court may punish as a contempt may be punished as such by a court of bankruptcy.'

"Section 725, Rev. Stats. U. S., vests the Federal Courts with power 'to punish by fine or imprisonment, at the discretion of the Court, contempts of their authority; . . . and a disobedience or resistance . . . by any party, juror, witness *or other person* to any lawful writ, process, order, rule, decree or command of the said courts.'

" 'To render a person amenable to any injunction, it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor have been actually served with a copy of it, so long he appears to have had actual notice.'

"In re Lennon, 166 U. S. 548; *American Steel*

etc. Co. vs. *Wire Drawers' Union,* 90 Fed. 598, 604; *Phillips* vs. *Detroit,* 19 Fed. Cas. No. 11,101.

"None of the respondents were formal parties to the bankruptcy proceeding. The order which restrained Mr. Wylie and the Exploration Mercantile Company from selling or otherwise disposing of its property, does not include or restrain Mr. Stone, Mr. Morehouse, Mr. Thompson, or Mr. Hobbs by name, or by any general description. The injunction prohibiting further prosecution of the suit in the State Court, and all further steps and proceedings therein, runs against the Exploration Mercantile Company, Mr. Stone, Mr. Wylie, and the agents, servants, attorneys and counselors of each of them. Mr. Hobbs, Mr. Thompson and Mr. Morehouse are not expressly named therein. The omission of the name of Mr. Stone, or the name of any other respondent, however, did not give any authority or permission to advise, persuade, or compel Mr. Wylie to disobey or ignore the orders of this Court. Orders and injunctions are among the instruments with which Courts accomplish their ends, and perform their duties. Any person, be he party or not, who knowingly thwarts the purpose of the Court, either by resisting its commands, or wilfully counseling, aiding, abetting, inducing or compelling the party who is enjoined, to resistance or disobedience, acts at his peril. While such conduct, under some authorities, may not constitute a technical breach of the injunction, it is, nevertheless, disrespectful to the Court, and may be treated and punished as contempt, under section 725, *supra.*

"It is said in *In re Reese,* 107 Fed. 942, 945, that 'The power to punish for contempt is not limited to cases of disobedience by parties to the suit,

of some express command of rule against them, but, subject to the limitations imposed by section 725, *supra,* is coextensive with the necessity of maintaining the authority and dignity of the court'."

"It is the usual practice in granting an injunction against a corporation to extend the injunction to officers, attorneys, agents and employees of the company. And this is just as effectual against such servants, officers, employees and attorneys as though they were parties defendant to the original bill.

"*Sidway* vs. *Missouri Land & Livestock Co.,* 116 Fed. 381, 390; *Toledo etc. Ry. Co.* vs. *Penn. Co.,* 54 Fed. 746; *Hedges* vs. *Court,* 7 Pac. 767.

"Such an injunction is binding, not only upon the corporation, but on each individual who acts for the corporation in the transaction of its business, provided he has knowledge of the writ and its contents.

"*Ex parte Lennon,* 64 Fed. 320; *People* vs. *Sturtevant,* 59 Am. Dec. 536, 546; *Morton* vs. *Superior Court,* 4 Pac. 489; 2 High on Inj., sec. 1443.

"The rule that a stranger to the suit can be punished for contempt rests not only on the clear language of the statute itself, but on the broad doctrine that the power to make an order carries with it an equal power to enforce the order by punishing those who disobey or resist it. Otherwise the lawful commands and purposes of the Court might be thwarted, and brought to naught by the resistance of strangers.

"In *Seaward* vs. *Paterson,* 1 Ch. 545, 76 L. T. N. S. 215, an injunction was issued against Paterson to restrain him from holding glove-fights or

boxing contests on certain premises. One Murray who had later acquired possession of the premises and conducted boxing contests thereon, was cited for contempt. It was insisted in his behalf that he was neither a party to the action nor an agent or servant of such party, and that consequently he could not be held. He was adjudged guilty of contempt, however, on the ground of knowingly aiding and assisting in doing that which the Court had prohibited. In approving of this action on the part of the trial court, the court of appeals drew a distinction between the kind of contempt here complained of and that which consists in a disobedience to an order by a party to the suit. Among other things, Lindley, L. J., after observing that Murray was not a party to the action, either first or last, but that he knew all about the order and was responsible for the violation of it, said: 'Now, let us consider what jurisdiction the court has to make an order against Murray. There is no injunction against him. He is no more bound by the injunction granted against Paterson than any other member of the public. He is bound, like other members of the public, not to interfere with, and not to obstruct the course of justice; and the case, if any, made against him must be this—not that he has technically infringed the injunction which was not granted against him in any sense of the word, but that he has been aiding and abetting others in setting the court at defiance, and deliberately treating the order of the court as unworthy of notice. If he has so conducted himself, it is perfectly idle to say that there is no jurisdiction to attach him for contempt as distinguished from a breach of the injunction. . . . I confess that it startled me, as an old

equity practitioner, to hear the jurisdiction contested upon the facts in this case. It has always been a familiar doctrine to my brother Rigby and myself that the order of the Court ought to be obeyed, and could not be set at naught and violated by any member of the public either by interference with the officers of the court, or by assisting those who are bound by its orders.' To the same effect see:

"*Bessette* vs. *W. B. Conkey Co.,* 194 U. S. 324; *Wellesley* vs. *Earl of Mornington,* 11 Beav. 181.

"*In re Reese, supra,* is much relied on by respondents. That case arose out of labor difficulties in Kansas. An injunction has been issued out of the Federal Court against some 46 named persons, and other citizens of Kansas, 'who have or may combine or confederate with them, restraining interference with complainant and its employees.' Reese came with three hundred men from Iowa. It is charged that he interfered with complainant's miners, but not that he aided or abetted defendants, or confederated with them, or that he was an agent, servant or employee. He was not a citizen or resident of Kansas. He seems to have acted independently of the defendants. The Court held that he could not be punished for violating the injunction, because he was neither a party to the case itself, nor agent, servant, employee or attorney of any part or party thereto, and inasmuch as he had not been charged with aiding, abetting or confederating with them, he was discharged.

"In the present case all the evidence tends to show that Wylie, Stone, Morehouse and Thompson were acting together as allies and confederates; that Mr. Stone was their leader. The charge is

that Stone wilfully and contemptuously demanded and received from said C. E. Wylie certain sums of money. Thompson and Morehouse are charged with actively counseling and advising Wylie to disobey the orders of this Court, and to pay the money demanded by Stone.

"This distinction is a very important one, and it brings the conduct of the respondents just named clearly within the following rule stated by Judge Adams in the Reese case:

" 'It is entirely consonant with reason, and necessary to maintain the dignity, usefulness and respect of the court, that any person, whether to a party to a suit or not, having knowledge that a court of competent jurisdiction has ordered certain persons to do or abstain from doing certain acts, cannot intentionally interfere to thwart the purposes of the court in making such order. Such an act, independent of its effect upon the rights of suitors in the case is a flagrant disrespect to the Court, which issues it, and an unwarrantable interference with, and obstruction to, the orderly and effective obstruction of justice, and as such, is and ought to be treated as contempt of the court which issued the order.'

"In *Huttig Sash & Door Co.* vs. *Fuelle,* 143 Fed. 363, there was a temporary order enjoining defendants from boycotting complainant in person or through the agency of others. Several of the defendants were cited to show cause why they should not be punished for contempt. With them were joined three persons, Bohnem, Crowe and Mellville, who were not defendants in the original suit, and were not named in the restraining order. They are charged, however, with aiding, abetting and assisting others in violating the restraining or-

der. All were found guilty of contempt, including the three parties last named.

"The case at bar is like the one just cited. Stone, Morehouse and Thompson are not named as defendants. The restraining order does not run in terms against agents, employees, or attorneys, but it is charged that Stone wilfully and contemptuously demanded and received from C. E. Wylie certain sums of money; that Thompson and Morehouse wilfully and contemptuously demanded and received the sum of $1000.00; and that Thompson advised and counseled Wylie to pay Stone's demand. The evidence shows that Stone on the very day he was served with the restraining order gave notice that the rent of the building owned by him and occupied by the company would be raised from $500 to $1,500 per month; and later he actually collected $1,500 rental for the month of December. He also threatened to bring suit for rent and trebble damages, and notified Wylie to vacate. Morehouse and Thompson advised the payment of the money to Stone. The conduct charged and proven certainly is that of counseling, aiding and abetting Wylie in his violation of the restraining order.

"In *Sloan* vs. *The People,* 115 Ill. App. 84, 89, it was held that under charge of violating an injunctional order a respondent may be convicted of aiding and abetting others in such violation as the former charge includes the latter."

IV.

The fourth assignment of alleged error, that C. E. Wylie was the receiver of the State Court, and, as such, could not be enjoined because beyond the injunctive

process of the United States Court, and that his attorneys were in like case, has been fully answered in paragraph III of this brief.

V.

The fifth alleged error assigned, that the Court had no jurisdiction because the suit in the State Court was not founded upon a claim from which a discharge in bankruptcy would be a release, has also been fully answered in paragraph III of this brief.

See also Opinion, Trans., pp. 137-148, inclusive.

VI.

The sixth alleged error assigned, that the plaintiffs in error were not parties to the bankruptcy proceedings, that all their acts were as officers of the State Court, which alone had jurisdiction until adjudication in bankruptcy, and that they are not charged with anything done after adjudication, has been answered in paragraph III herein.

VII.

The seventh alleged error assigned is that the property was in the possesseion of the State Court through its receiver, holding adverse to the bankrupt, and, therefore, he could not be proceeded against by any summary process, for that would be violating his possession without "due process of law," and that he dared not obey the injunction as it would place him in contempt of the State Court.

But it has already been shown that the receiver was

not holding adversely to the bankrupt. The order dissolving the corporation and appointing a receiver being void, Mr. Wylie was but a bailee for the Exploration Mercantile Company. (Trans., p. 137.) And, had it not been void, it is a settled fact in the case that the plaintiffs in error were confederated together and there was no adverse holding. (Trans., pp. 123, 136.)

And, furthermore, the contention has been fully answered in paragraph III, *supra*.

VIII.

The eighth alleged error assigned is that the injunction and stay order were only preliminary and not perperpetual, and therefore ceased on the date of adjudication, and that no jurisdiction remains to take proceedings after that time.

But the orders themselves provide that they shall be in force, the one, "until our District Court shall make further order in the premises," and the other, "until the decision of this Court upon the motion." (Trans., pp. 16, 20.) And it has now been duly found as a fact in the case, which is not, and cannot be, questioned in this Court.

> "That said two orders have been at all times since their issuance, and now are, in full force and effect, and have not been modified."
>
> Trans., p. 90.

The fact that an injunction has been erroneously or irregularly granted, or that there is an irregularity or error in the order itself, is no excuse for it violation.

> "If the court acquired jurisdiction, and did not

exceed its powers in the particular case, no irregularity or error in the procedure or in the order itself could justify disobedience of the writ. (*Elliott* v. *Persol,* 1 Pet. 340; *Ex parte Watkins,* 3 Pet. 193; *In re Goy,* 127 U. S. 731, 8 Sup. Ct. Rep. 1263.) The considerations of public policy on which this rule rests are too plain and well understood to need restatement.

"Was the case one of which the court had jurisdiction? No question is made, or could be made in proceedings for contempt, of the sufficiency of the petition for the injunction in matters of form and averment merely."

United States vs. *Debs,* 64 Fed. 729, 739.

See also:

Trans., p. 133;
22 Cyc. 1009;
Wells vs. *Oregon R. & N. Co.,* 19 Fed. 20.

The offense was complete long before the adjudication. The wrong was done while the injunction was in force. Nothing has transpired to excuse the contemptuous acts. The fact of adjudication confirmed the propriety of the injunction, it could not, surely, abolish the remedy for its breach.

IX.

The ninth alleged error assigned is that the answer of the plaintiffs in error, being under oath, is a complete defense, and, therefore, the court had no power to render judgment against them.

The sworn answers admit and aver that the plain-

tiffs in error deliberately and intentionally disobeyed the Court's orders. The theory is the same as it would be were a person charged with crime to set up as a defense that while he admitted the crime in every particular and the intent to commit it, nevertheless, he should not be punished because he had the highest respect for the person against whom the crime was directed. The misapprehension of the law, which the plaintiffs in error invoked in an attempt to hinder, delay and defraud the creditors of the bankrupt, cannot avail them, for, *"Ignorantia juris neminem excusat."*

21 Cyc. 1726, and authorities cited, note 67.

In a proceeding for contempt in a court of equity or bankruptcy, the answer of the respondent, though under oath is not conclusive, and his denial of the contempt does not entitle him to a discharge.

In re Fellerman, 149 Fed. 244;
United States vs. *Shipp,* 203 U. S. 563, 51 Law Ed. 319;
Kirk vs. *United States,* 192 Fed. 273;
Merrimack River Savings Bank vs. *City of Clay Center,* 219 U. S. 527, 31 Sup. Ct. Rep. 295.

This has always been the rule in equity and a court of bankruptcy is a court of equity.

Clay vs. *Waters,* 178 Fed. 385, 394.

X.

The tenth alleged error is that the case being for criminal contempt the plaintiffs in error cannot be

held guilty except beyond a reasonable doubt, and it appears by the record that they were acting under an honest belief that their acts were lawful.

It has been found as a fact, which, as has already been shown, cannot be questioned upon a writ of error, that they and each of them, knowingly, wilfully and contemptuously disobeyed the lawful orders of the Court.

Trans., pp. 90 to 95, inclusive.

The evidence not having been brought up, the fact is finally established no matter what degree of proof is required.

The question as to whether this is a case of civil or criminal contempt has been fully discussed in paragraph II of this brief.

XI.

The eleventh alleged error assigned is that all the acts done in violation of the orders of the United States Court were done under the authority of the State Court.

But the State Court was invoked for the very purpose of avoiding the rights of the creditors of the bankrupt and by application to the State Court the plaintiffs in error could at any time have been permitted to obey the United States Court. Indeed, it would not have been necessary to do that, for the obedience to the latter court would not have conflicted with any duty or order of the State Court.

The evidence as to these matters not having been brought up by bill of exceptions, however, this Court

will not inquire into the facts. The action of the trial Court is conclusive.

And, as shown by the opinion of the trial Court, the State Court never had jurisdiction.

> *Golden* vs. *District Court,* 31 Nev. 250;
> See also Opinion, Trans., pp. 133-148, and paragraph III of this brief.

XII.

The twelfth alleged error assigned is that, although the United States Court had jurisdiction, it was the duty of the State Court to settle the accounts of the receiver it had appointed and allow him his counsel fees.

The answer to this contention is admirably stated in the opinion of the trial Court (Trans., p. 149), as follows:

> "The fact that the $1,000 received by Mr. Thompson and Mr. Morehouse from Mr. Wylie was paid ostensibly as attorneys' fees does not, in my opinion, excuse them. Their appropriation of the money was in defiance of the order of this court. Their services were performed in an unsuccessful attempt to enable an insolvent corporation, guilty of an act of bankruptcy, by the very act of bankruptcy to defeat the jurisdiction of this court. Their efforts resulted in litigation, obstructing the bankruptcy proceedings, and causing delay and great expense, with no benefit whatever to the estate. Even though they believed they were within their legal rights, and that the state court had priority of jurisdiction, that fact affords no reason why the estate should pay them

for making such an error, or for performing services which were of no benefit.

"*In re Zier & Co.,* 142 Fed. 102."

Furthermore, the State Court had no jurisdiction, as already pointed out in paragraphs III and XI, *supra.*

XIII.

The thirteenth error alleged is that the petitioning creditors invoked the jurisdiction of the State Court and are, therefore, estopped from presenting to the United States Court the facts showing the contempt of the latter Court.

To which it is sufficient to answer:

1. That the evidence is not before this Court and that the action of the United States District Court is conclusive.

2. That the petitioning creditors appeared specially in an endeavor to show the State Court the true state of the case and to prevent a violation of the orders of the United States Court, and expressly reserving their rights as petitioning creditors; that it is not true that the allowance was made on their own motion; and that the steps named were taken by the plaintiffs in error in further pursuance of their plans to hinder, delay and defraud the petitioning creditors.

Trans., pp. 121-123.

3. That the State Court was without jurisdiction.

Golden vs. *District Court,* 31 Nev. 250.

XIV.

The fourteenth alleged error assigned is that W. P. Fuller & Co. was the moving party in the State Court and not the plaintiffs in error.

Again, it must be said, this is a question of fact which has been finally settled against the petitioning creditors. The proceedings in the State Court were taken by the plaintiffs in error as found by the Court.

Trans., pp. 93, 94.

XV.

The fifteenth alleged error assigned is that the petition in bankruptcy did not pray for an injunction or stay order, that the plaintiffs in error were not parties to the bankruptcy proceeding, that the affidavit upon which the restraining orders were issued is insufficient to give jurisdiction, and that the Court was without jurisdiction because the property was in the hands of the receiver of the State Court.

> 1. "It is improper to incorporate in a creditors' petition for an adjudication in involuntary bankruptcy allegations charging other creditors with having received voidable preferences, or a prayer for the seizure of property of the alleged bankrupt in the possession of adverse claimants, or a prayer for an injunction forbidding a receiver of the respondent, appointed by a state court, to distribute the property in his hands, as such matters can only be litigated in a separate proceeding. Such allegations and prayers are multifarious, and will be considered as stricken out."
>
> (Syllabus) *Mather* vs. *Cole,* 92 Fed. 333.

It has been repeatedly held that the method adopted in the case at bar, by separate petition, is the proper one.

> *In re Jersey Island Packing Co.,* 138 Fed. 625;
> *Horner-Gaylord Co.* vs. *Miller & Bennett,* 147 Fed. 295;
> *In re Electric Supply Co.,* 175 Fed. 612;
> *Blake, Moffitt & Towne* vs. *Francis Valentine Co.,* 89 Fed. 691.

2. It has been fully shown in paragraph III, *supra,* that, under the circumstances of this case, it is entirely immaterial that the plaintiffs in error were not parties to the bankruptcy proceeding.

3. The petition for the restraining order, duly verified, is sufficient under the Bankruptcy Act, as is more fully shown in paragraph II of this brief.

> "If the court acquired jurisdiction, and did not exceed its powers in the particular case, no irregularity or error in the procedure or in the order itself could justify disobedience of the writ. . . . No question could be made in a proceeding for contempt of the sufficiency of the petition for the injunction in respect to matters of form and averment merely.
>
> *United States* vs. *Debs,* 64 Fed. 724, 739.

4. The relative jurisdictions of the State and Federal Courts have been fully shown in paragraph III hereof.

XVI.

The sixteenth alleged error assigned is that the plaintiffs in error acted in good faith, that they are attorneys at law representing only the receiver in the State Court, and that their answer cannot be traversed.

1. One is always held to intend the direct, natural and probable consequences of acts intentionally done. Wrongful acts knowingly or intentionally committed can neither be justified nor excused on the ground of innocent intent. The color of the act determines the complexion.

In re Rice, 181 Fed. 217, 224;
Agnew vs. *United States,* 165 U. S. 50, 17 Sup. Ct. Rep. 235, 41 Law Ed. 624.

Having ability to comply, and having intentionally and designedly disobeyed the order, realizing fully what is enjoined, the company cannot be heard to say that it did not intend disobedience to the process of the Court. The intent is shown by the act, which speaks for itself.

In re Home Discount Co., 147 Fed. 538, 555.

2. The question of fact as to what the plaintiffs in error were and who they represented, as already shown, cannot be now considered. And the fact is not correctly stated in the assignment of error.

3. "A proceeding in bankruptcy is a proceeding in equity, and for the purpose of enforcing and protecting its jurisdiction a court of bankruptcy has all the inherent powers of a court of equity."

In re Swofford Bros. Dry Goods Co., 25 Bankr. Repts. 282, 286, 180 Fed. 549.

In a proceeding for contempt in equity, a sworn answer, however full and unequivocal, is not conclusive.

Employers' vs. *Teamsters,* 141 Fed. 679, 686, 687;

U. S. vs. *Debs,* 64 Fed. 724, 738.

XVII.

The seventeenth assignment of alleged error is that the affidavit of P. F. Carney is insufficient to give the Court jurisdiction.

But, under the authorities cited in paragraph II, subdivision 6, the affidavit is clearly sufficient, and, having answered on the merits without objection, the question cannot now for the first time be raised.

Aaron vs. *U. S.,* 155 Fed. 833.

XIX.

The nineteenth assignment is an iteration of all the previous grounds, which have been fully answered.

It appears then, that there is no error in the record, that the judgment and order of the trial Court are just and equitable, and that, this being a civil contempt and not reviewable by writ of error, the action of the trial Court must be upheld and this writ dismissed.

XX.

The contentions of the plaintiffs in error will now be further considered.

1. The contention that this is a criminal contempt has been answered in paragraph II, *supra.* Plaintiffs

in error made an extended argument to the trial Court in their reply brief that this is a civil contempt.

"Consensus tollit errorem."

Broom's Legal Maxim, (8th ed.), p. 112.

Or, as stated in the Civil Code of California:

"Acquiescence in error takes away the right of objecting to it."

Civ. Code, Sec. 3516.

Much more, then, when counsel is correct in his contention, will he be held to stick to the views which he maintained in the trial Court.

2. The cases cited of

Kirk vs. *Milwaukee,* 26 Fed. 501;
U. S. vs. *A. T. & S. F. Ry. Co.,* 16 Fed. 853;
Ex parte Robinson, 19 Wall. 512;
Van Zant vs. *Argentine M. Co.,* 2 McCrary, 642;
Haight vs. *Lucia,* 36 Wis. 355;
N. O. vs. *Steamship Co.,* 20 Wall. 392;
In re Childs, 22 Wall. 163,

are all early cases. Some are not at all in point. In so far as they hold, or suggest, that under section 725, Revised Statutes, a Federal Court is limited to punitive measures and cannot, in a contempt proceeding, give remedial relief to the complainant, they have been overruled.

In re Nevitt, 117 Fed. 448, 453, 458, (C. C. A.);
In re Debs, 158 U. S. 564, 39 Law Ed. 1092;
Bessette vs. *Conkey Co.,* 194 U. S. 324, 48 Law Ed. 997;

And other cases cited in par. II, *supra.*

3. The old United States District Court for the district of Nevada was not abolished.

Sections 69 and 94 of The Judicial Code state concisely what was the existing law. Being substantially the same as existing statutes, they are made by section 294 continuations thereof. Hence, so far as the District Court of Nevada is concerned, there is no application to this case of the repeal of

> "All acts and parts of acts authorizing the appointment of United States Circuit or District Judges, or creating or changing judicial circuits or judicial districts, or divisions thereof," etc., "enacted prior to February first, nineteen hundred and eleven."

There has been no creating or changing of judicial circuits or judicial districts, or other repeal of the old court in that district.

The clause in the last paragraph of section 297 of The Judicial Code: "Also all *other* acts and parts of acts, in so far as they are embraced within and superseded by this act, are hereby repealed," must be construed with section 294. That is to say *other* acts *embraced within and superseded by* this act. The District Court was continued.

Furthermore, the contempt proceeding was begun July 9, 1909, and was pending at the time The Judicial Code went into effect and may be prosecuted with the same effect as if no repeal or amendment had been made. (Sec. 299.)

The case cited in vol. X, Ency. of Plead. & Prac., p. 1099, to uphold the rule that the Court which issued the injunction must inflict the punishment for contempt is *Manderscheid* vs. *District Court,* 69 Iowa, 240. That case holds that it was proper to entitle the contempt matter in the original cause and it would be improper to bring the contempt proceedings before a different court in an independent action.

The case of *Ex parte Bradley,* 7 Wall. 364, is no more in point than the other. The quotation on page 12 of the brief of plaintiffs in error is distorted. In that case there was no change in the law pending the proceeding for contempt. The change of law took place in 1863, the alleged contempt in 1867. The legislation was reviewed to show that there were two separate courts—the criminal and the supreme—existing at one and the same time, and then held that the supreme court could not punish for contempt committed in the criminal court.

The case of *Kirk* vs. *Milwaukee,* 26 Fed. 501, as already shown, has been overruled as to civil contempts.

On pages 506 and 507 this very case argues that contempt proceedings will lie in the Federal Court on removal from a State Court, for contempt committed in the State Court, where it necessarily involves the enforcement of a civil remedy and not a purely criminal contempt.

The Judicial Code (sec. 299) clearly holds the repeal in abeyance as to all laws which would affect the pending proceedings in this case.

4. The contention that section 11 of the Bankruptcy

Act is the only authority for the injunctions has been fully answered in paragraph II, *supra.*

5. The act of bankruptcy is the application to the State Court for a receiver, and it does not depend upon the failure of the applicant to state facts in his application sufficient to give that Court jurisdiction. (Trans., pp. 135, 136.) Hobbs was never made a party to, nor did he appear in, the State Court proceeding. The argument is that because they were all conspiring together to defraud their creditors, therefore the State Court had jurisdiction, although they did not plead necessary facts. (Brief plaintiff in error, pp. 15, 16.)

6. Contempt proceedings are *sui generis.* It is criminal in its nature, in that the party is charged with doing something forbidden, and, if found guilty, is punished. Yet it may be resorted to in civil as well as criminal actions, and also independently of any civil or criminal action.

> *Bessette* vs. *Conkey Co.,* 194 U. S. 324, 39 Law Ed. 1092.

The pleadings were sufficient—paragraphs II, XV. The Bankruptcy Act gives jurisdiction and there is here no question of a suit in equity where there was a plain, speedy and adequate remedy at law. Paragraph II, *supra.*

7. In paragraph IV of their brief plaintiffs in error attempt to attack the sufficiency of the petitions for the injunctions, because of the form of verification of the petitions for the injunctions.

The verification is at best a matter of form only, and may be amended on demurrer.

In re Gift, 130 Fed. 230.

The Court having power to issue the injunction, a man who is enjoined and violates the injunction cannot escape punishment by alleging that the bill was demurrable.

U. S. vs. *Agler,* 62 Fed. 824, 826.

"With whatever irregularities the proceedings may be affected, or however erroneously the court may have acted in granting the injunction in the first instance, it must be implicitly obeyed so long as it remains in existence, and the fact that it has been granted erroneously affords no justification or excuse for its violation before it has been properly dissolved. And the party against whom an injunction issues will not be allowed to violate it on the ground of want of equity in the bill, since he is not at liberty to speculate upon the intention or decision of the court, or upon the equity of the bill, or to question the authority of the court to grant relief upon the facts stated, except upon application to dissolve the injunction. . . . And upon proceedings for contempt in this class of cases the only legitimate inquiry is whether the court granting the injunction had jurisdiction of the parties and of the subject matter, and whether it made the order which has been violated, and the court will not in such proceedings consider whether the order was erroneous.

High on Injunctions, (4th ed.), sec. 1416;
Rogers vs. *Pitt,* 89 Fed. 424.
See also par. VIII, *supra.*

The cases cited by plaintiffs in error are not in point.

In *In re Vastbinder,* 126 Fed. 417, a special demurrer to a petition in bankruptcy was sustained.

High on Injunctions, section 1567, (4th ed.), holds that in case of an injunction in and of a creditor's bill it is sufficient if complainant swears upon information and belief. What is there said with reference to a direct attack on the pleading is not applicable in contempt as shown by section 1416 by the same author.

Campbell vs. *Morrison,* 7 Paige, 157, was a case of dissolving an injunction, not contempt, and holds that, under some circumstances, an affidavit on information and belief is sufficient, and the verification in the case at bar shows the absence of the petitioning creditors from the State.

In view of the statement on page 2 that there was no controversy in the State Court among the parties seeking its jurisdiction, the language used with reference to being "between two fires" is without merit. An application to the State Court by common consent would have been sufficient. There was no order of the State Court making it obligatory upon them to take the money and consequently they were not between two fires.

8. In further answer to paragraph V of the brief of plaintiffs in error it may be said the pleadings and proof are sufficient. (Trans., pp. 137-149.) The proceedings had, admissions made and evidence submitted September 18, 1908, at 10 o'clock is not before the Court now. The cases cited on page 29 of said paragraph are governed by state statutes and are not in point. The injunction, although merely temporary, continues until vacated by the Court.

Loveland on Bankruptcy (3rd ed.), p. 257.

In *Houghton* vs. *Courtelyou,* 208 U. S. 149, the temporary restraining order was superseded by a permanent injunction and by the terms of the former it terminated. The case here is otherwise.

9. It would seem self-evident that the violation of a temporary injunction, valid in every particular, cannot be justified because the remedy is not applied until after final judgment in the main cause. The case of *Houghton* vs. *Meyer,* 208 U. S. 149, cited by the other side, is conclusive. There is no question of repeal, but only the violation of a lawful order, which still stands and is effective as to all acts during that time.

10. The brief of defendants in the trial Court is fully answered by the opinion of the Court. (Trans., p. 123 *et seq.*)

11. On page 2 of the brief of plaintiffs in error they admit that the parties in contempt were all acting together; the Court found that they were allies and confederates in a fraudulent scheme (Trans., pp. 93, 94 and 95); and the State Court never had jurisdiction. (Trans., p. 137.) Wylie's possession was not adverse to the bankrupt. The cases cited on page 63 of the brief of plaintiffs in error are, therefore, not in point. *In re Wells,* 114 Fed. 222, 224, expressly holds that where property passed into the hands of a party as agent of the bankrupt, the Federal District Court could by orders and contempt proceedings coerce the surrender of such property to the trustee in bankruptcy.

> "The moment a petition in bankruptcy" (involuntary) "is filed the jurisdiction of the bankruptcy

court begins. *It has the effect both of an attachment and an injunction,* and the adjudication of bankruptcy discharges any attachment levied within four months prior to the filing of the petition, unless the bankruptcy court shall order the lien preserved for the benefit of the bankrupt's estate, and *it operates as a seizure of the property,* the title to which subsequently passes to the trustee."

Staunton vs. *Wooden,* (C. C. A., 9th Cir.), 179 Fed. 61, 62.

The Court certainly had the power and jurisdiction to make any order in support of such attachment, injunction and seizure. If a person may sweep aside this ample power by the array of technicalities here presented the bankruptcy court is powerless and inefficient. The plaintiffs in error herein participated in a scheme to defraud, whereby they wasted the bankrupt's estate, obtained and seek to appropriate large sums of money. The Court has ordered them to restore it. Every consideration of justice and good conscience, it seems to the defendants in error, demands that the order of the bankruptcy court be upheld, and they confidently expect this Court to so hold.

Respectfully submitted.

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